88-263

No.

In the Supreme Court of the United States

OCTOBER TERM, 1988

GENERAL MOTORS CORPORATION, PETITIONER

v.

SHEILA ANN GLENN, PATRICIA F. JOHNS AND ROBBIE NUGENT, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CHARLES A. POWELL, III
BARRY V. FREDERICK
Powell, Tally & Frederick
Suite 700
New South Federal Bldg.
21 First Avenue North
Birmingham, AL 35203
(205) 324-4996

DAVID M. DAVIS
MARK R. FLORA
General Motors Corporation
Office of General Counsel
3031 West Grand Boulevard
Detroit, MI 48202
(313) 556-5000

KENNETH S. GELLER *
STEPHEN M. SHAPIRO
JAMES D. HOLZHAUER
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

Plaintiffs, who are female employees of General Motors Corporation ("GM"), sued GM under the Equal Pay Act, claiming that they were paid less than their male counterparts for doing the same work. GM demonstrated that the pay differentials were due to its practice of retaining the pay level of employees who transfer from hourly-wage jobs to lower-paying salaried positions within the company. The court of appeals held that this practice was not based on a "factor other than sex" under the Act, 29 U.S.C. § 206(d).

The questions presented are:

1. Whether an employer's practice of maintaining the pay level of employees who transfer between jobs in a company is a practice lawfully based on a "factor other than sex" under the Equal Pay Act.

2. Whether an employer's utilization of such a practice may be characterized as a "willful" violation when the employer relied on a widely-accepted interpretation of the Equal Pay Act subsequently rejected by the court of appeals.

3. Whether an employer's utilization of such a practice may be characterized as "bad faith" conduct when the employer's representatives were found by the district court to have acted in the "good faith belief" that they were adhering to lawful company policy.

PARTIES TO THE PROCEEDING AND RULE 28.1 STATEMENT

The caption includes all of the parties to the proceeding.

The affiliates and subsidiaries of General Motors Corporation, other than wholly-owned subsidiaries, are listed in App. G, *infra*, 57a-58a.

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General Motors Corporation petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-19a) is reported at 841 F.2d 1567. The initial opinion of the district court (App., *infra*, 20a-34a) and its subsequent opinion on motion for attorneys' fees (App., *infra*, 35a-49a) are reported at 658 F. Supp. 918.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1988 (App., *infra*, 50a-51a). Pursuant to an order issued by Justice Kennedy, the time for filing a petition for a writ of certiorari was extended to and in-

cluding August 13, 1988 (App., *infra*, 52a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

The Equal Pay Act, 29 U.S.C. § 206(d), Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), and Sections 6(a) and 11 of the Portal-to-Portal Act of 1947, as amended, 29 U.S.C. §§ 255(a) and 260, are set forth at App., *infra*, 53a-56a.

STATEMENT

This case involves the common employment practice of allowing employees who transfer from a higher-paying job to a lower-paying job within the same company to retain the level of pay they received in their former job. Employers follow this practice, often called "rate (or wage) retention" or "income maintenance," for a variety of legitimate reasons: to encourage transfers (particularly to supervisory or salaried positions), to maintain employee morale, to enable minority employees to move into job lines with greater promotional opportunities, to develop a more flexible work force with a greater variety of skills, to retain skilled employees who may be needed in the future, to ease the burden on employees during times of economic contraction, and to accommodate workers who are no longer able to perform their previous jobs.

General Motors Corporation ("GM") pays employees who transfer from hourly wage jobs to lower-paying salaried positions at least as much as they previously earned. Because that sex-neutral practice fortuitously resulted in a disparity between the wages received by men and women in one nine-employee job unit at GM's facilities at Athens, Alabama, the court of appeals held that GM violated the Equal Pay Act. The court below reached this conclusion even though it made no finding that sex played any role whatsoever in the company's employment, compensation or transfer decisions. Beyond

this, the court of appeals held that GM's violation was "willful" (*i.e.*, in reckless disregard of its legal obligations), even though it conformed to the decision of the only other court of appeals to have decided the issue and to the rulings of several district courts. Finally, the court of appeals held that GM acted in "bad faith," even though the district court expressly held that the company officials who made the pay decisions had a good-faith belief they were following a lawful company policy.

1. This action was brought by three female plaintiffs employed as salaried "follow-up" workers in the Materials Management Department of three GM plants near Athens, Alabama. The three-plant department had a total of nine follow-up workers. Follow-up workers were responsible for ensuring that an adequate supply of tools and operating materials were on hand. They ordered needed tools and materials, dealt with salespersons, managed inventories, and made special or "emergency" purchases for their plants. App., *infra*, 3a, 21a.

The three plaintiffs and the male employees with whom they were compared in this litigation arrived at their follow-up jobs through distinctly different routes. All but one of the men transferred to their jobs from higher-paying hourly wage positions. App., *infra*, 22a-25a. They thus benefitted from GM's practice of paying employees who transfer from hourly wage jobs to salaried positions at least the amount they had earned previously.[1] By contrast, plaintiff Robbie Nugent was hired "off the street" as a follow-up worker and accordingly began at the bottom of the salary scale for the job. The other two plain-

[1] One of the seven male comparators, Steven D. Greenlee, had not been working for GM when it hired him as a follow-up worker in April 1979. Greenlee had been employed by a GM supplier and was hired to purchase the parts he had previously supplied. His special skills and expertise warranted a higher salary. Tr. Vol. 2 at 69-70; Tr. Vol. 3 at 106. "Tr." references are to the trial transcript in the district court.

tiffs, Sheila Glenn and Patricia Johns, transferred to follow-up jobs from relatively low-paying salaried positions as stenographer and secretary. *Id.* at 21a-22a. None of the employees, male or female, who transferred to follow-up jobs from other positions at the company suffered a reduction in pay. Most received a small increase. The largest increase (10%) was received by a woman, plaintiff Glenn. *Id.* at 22a.[2]

GM officials testified that the compensation of the employees who transferred from hourly wage jobs to salaried follow-up positions was set in accordance with a longstanding, sex-neutral, company-wide practice of paying such employees at least as much as they made in their hourly jobs. Although there was no formal written document establishing or describing the practice, it was acknowledged and discussed in a 1975 Report of the company's Personnel Analysis Group. Defendant's Exhibit No. 2, at 18-19. The purpose of GM's practice was to encourage employees to move into salaried positions; management officials understandably believed that employees would be reluctant to transfer if that resulted in a cut in pay. App., *infra*, 28a.

Thus, some follow-up workers were paid more than plaintiffs because they transferred to their jobs from higher-paying hourly wage positions, while plaintiffs were either hired "off the street" at the bottom of the salary

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[2] The district court opinion indicates that the monthly salaries of men who transferred from hourly jobs to salaried follow-up positions changed as follows: Stephen Downs, salary increased from $932.35 to $975.00 per month (4.5%); Harold Wales, first transfer, from $1,216.57 to $1,230.00 (1%); Robert Stephenson, first transfer, $1,171.51 to $1,220.00 (4.1%); Billy White, $1,608.22 to $1,656.46 (2.9%). App., *infra*, 23a-24a.

Of the two women who transferred from salaried clerical positions to salaried follow-up jobs, the court gave the pre- and post-transfer salary of only one, Sheila Glenn. Her salary was increased from $1,310.40 to $1,441.44 (10%). App., *infra*, 22a.

scale (and worked up from there) or transferred from lower-paying clerical positions. App., *infra*, 21a-25a. In this instance, the follow-up workers who transferred from higher-paying jobs were men; plaintiffs, whom GM hired "off the street" or who transferred from lower paying jobs, were women. In other job categories, however, female employees received the benefit of GM's practice and earned higher pay than their male counterparts. Tr. Vol. 3 at 99-102. By focusing on the effect of GM's sex-neutral practice on only a single small department, plaintiffs alleged that the practice resulted in men illegally being paid more than women.

2. Plaintiffs brought this action in the United States District Court for the Northern District of Alabama in October 1983, claiming that GM paid them less than men doing equal work, in violation of the Equal Pay Act, 29 U.S.C. § 206(d).[3] The district court found that plaintiffs had established a prima facie case by showing that they did equal work as follow-up employees but received less pay than men in the same job. App., *infra*, 28a.

The district court rejected GM's affirmative defense that the pay disparity was due to a "factor other than sex" (29 U.S.C. § 206(d)(1)(iv)—namely, the company's sex-neutral practice of not requiring employees to take a pay cut when transferring from hourly wage jobs to salaried positions. Significantly, the court did *not* find that GM's compensation decisions were based on sex. To

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[3] The district court issued its original Opinion and Order on July 10, 1986, resolving all issues except the computation of damages and attorneys' fees and plaintiffs' entitlement to prejudgment interest. App., *infra*, 20a-32a. On February 4, 1987, the district court issued an addendum to its Opinion and Order. *Id.* at 35a-49a. The addendum discusses and decides several other issues, including the statute of limitations and liquidated damages. We will refer to the district court's July 10, 1986 opinion as its "initial opinion" and to the February 4, 1987 opinion as its "subsequent opinion."

the contrary, the court expressly concluded that the individual GM officials who made the pay decisions "held a good faith belief that General Motors had adopted a 'transfer pay policy.' " App., *infra*, 40a. The court nonetheless held that GM violated the Equal Pay Act, noting that its transfer pay policy "is not in writing" and "is in fact not a policy at all, but merely one aspect of a practice. In practice GM simply pays Follow-Ups what it takes to induce them to accept the employment." *Id.* at 28a.

The district court then turned to the question of the applicable statute of limitations. 29 U.S.C. § 255(a) provides for a two-year limitations period, except that "a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued." In its initial opinion, the district court applied the "in the picture" test established in *Coleman* v. *Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir. 1971), cert. denied, 409 U.S. 948 (1972), and held that GM's violation was willful because the company knew that the Equal Pay Act was "in the picture." App., *infra*, 30a-31a. In its subsequent opinion, the court noted that even if it were to apply the "reckless disregard" standard of *Trans World Airlines* v. *Thurston*, 469 U.S. 111 (1985), it would find that the violation was willful because GM ignored unidentified "clear signs that its practices were illegal. A violation rises to the level of reckless disregard when an employer has the resources to conform its conduct to the law, but declines to make the effort." App., *infra*, 38a-39a (footnote omitted).

In addition, the district court held that plaintiffs were entitled to double the amount of their actual losses under the liquidated damages provisions of 29 U.S.C. §§ 216(b) and 260. In its initial opinion, the district court declined to award double damages because "GM's violation of the Equal Pay Act, while 'willful' * * *, was in good faith and predicated upon reasonable grounds. * * * GM knew

that their conduct was governed by the Equal Pay Act, but created the pay disparity concerning plaintiffs in good faith believing the disparity justified on the basis of their hourly transfer pay 'policy.'" App., *infra*, 31a-32a. But in its subsequent opinion, the district court modified its order and awarded liquidated damages. The court held that the good faith exception to Section 260 did not apply and that it "ha[d] no choice but to award liquidated damages," because GM "adduced neither case law nor administrative rulings to demonstrate that there were reasonable grounds to support a belief that its acts were in conformity with the law." *Id.* at 41a.

3. The court of appeals affirmed the district court's decision with respect to liability and damages under the Equal Pay Act. The court of appeals held that GM's practice was not properly based on a "factor other than sex" within the meaning of 29 U.S.C. § 206(d)(1)(iv). Although it did not disturb the district court's fact finding that GM officials made the pay decisions in "good faith" based on what they believed to be a company policy of not reducing wages when hourly employees transfer to a salaried position, the Eleventh Circuit held that "prior salary alone cannot justify pay disparity." App., *infra*, 9a. The Eleventh Circuit narrowly limited the statutory "factor other than sex" defense to situations where "the disparity results from unique characteristics of the same job; from an individual's experience, training, or ability; or from special exigent circumstances connected with the business." *Id.* at 8a.

In holding that GM could not justify salary disparities on the basis of prior compensation, the court of appeals acknowledged that its decision "contradict[ed] the Seventh Circuit's holding in *Covington v. Southern Illinois University*, 816 F.2d 317 (7th Cir.), *cert. denied*, —— U.S. ——, 108 S.Ct. 146 (1987)." The Eleventh Circuit stated, however, that GM's defense in this case, and the Seventh Circuit's approval of an employer's "sex-

neutral policy of maintaining an employee's salary upon a change of assignment," impermissibly depended on a "market force theory to justify the pay disparity and * * * ignored congressional intent as to what is a 'factor other than sex.' " App., *infra*, 9a.

The court of appeals also concluded that GM's violation of the Equal Pay Act was willful and that the three-year statute of limitations applied under the *Jiffy June* "in the picture" standard. App., *infra*, 10a-12a. In the alternative, the court held that, even under the *Thurston* "reckless disregard" standard, the violation was willful because "GM sought to rely on the market force theory, a theory long discredited by this Court and the Supreme Court." *Id.* at 13a. On the same grounds, the court below held that GM's actions were not taken in good faith and that plaintiffs therefore were entitled to liquidated damages as a matter of law. *Id.* at 13a-14a.

REASONS FOR GRANTING THE PETITION

When Congress enacted the Equal Pay Act in 1963, some employers paid women less than men for the same work simply because they were women. The Act was designed to prohibit that unfair and intolerable practice. But it was not intended to be a sweeping regulation of employment practices generally. Thus, the Act prohibits only wage discrimination, not discrimination in hiring or promotions or any other form of employment discrimination. And it prohibits only wage discrimination based on sex, not legitimate sex-neutral practices that in particular instances may result in lower pay for some female employees. The Equal Pay Act does not require that all employees doing the same work receive the same compensation. It simply prohibits pay inequalities based on sex.

The Eleventh Circuit's decision in this case wrenches the Equal Pay Act from its foundations, ignores its plain language and legislative history, and threatens to disrupt

a longstanding, sex-neutral employment practice utilized by both large and small employers (including the federal government) nationwide. Moreover, the decision below invalidating GM's transfer pay practice conflicts with the Seventh Circuit's construction of the Act and with numerous district court rulings. Finally, the court of appeals' conclusion that GM's conduct was "willful" and "in bad faith" is flatly inconsistent with a recent decision of this Court. It is essential that the Court grant the petition for a writ of certiorari to resolve these conflicts and to prevent the needless destruction of an important and widespread employment practice of benefit to employers and employees alike.

I. The Court Of Appeals' Construction Of The Equal Pay Act Is Incorrect And Conflicts With The Decisions Of This Court And Of Other Courts Of Appeals

A. *The court of appeals erred in rejecting GM's "factor other than sex" defense.*

1. The Equal Pay Act, 29 U.S.C. § 206(d), prohibits employers from discriminating "on the basis of sex" by paying unequal wages to men and women doing equal work. To reinforce the fact that the Act only prohibits wage discrimination based on sex, Congress listed four affirmative defenses. Differences in pay do not violate the Act when they are

> made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on *any other factor other than sex.*

29 U.S.C. § 206(d)(1) (emphasis added).

The legislative history of the Equal Pay Act makes it abundantly clear that the "factor other than sex" exception was intended to be "a general catchall provision," *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 196 (1974), designed to ensure that the Act penalized em-

ployers only for making distinctions based on sex. As the House Report explained:

> Three specific exceptions and one broad general exception are also listed. It is the intent of this committee that any discrimination based upon any of these exceptions shall be exempted from the operation of this statute. As it is impossible to list each and every exception, the broad general exclusion has been also included.

H.R. Rep. No. 309, 88th Cong., 1st Sess. 3 (1963). Representative Griffin, one of the principal supporters of the bill, made the same point in commenting on the fourth exception during the debates on the Act:

> [R]oman numeral iv * * * makes clear and explicitly states that a differential based on any factor or factors other than sex would not violate this legislation. In other words, even though jobs involve the same skill, equal effort, equal responsibility, and are performed under the same working conditions, *if there is any other factor not based on sex upon which a differential is based, then no violation of this law can be found.*

109 Cong. Rec. 9203 (1963) (emphasis added). The Senate Report reiterated Congress's firm understanding that the Act only prohibited pay disparities based on sex:

> S. 1409 is designed to eliminate any wage rate differentials which are based on sex. Neither the committee nor anyone proposing equal-pay legislation intends that other factors cannot be used to justify a wage differential.

S. Rep. No. 176, 88th Cong., 1st Sess. 4 (1963).

The language and legislative history of the statute thus confirm that an employer does not violate the Act when pay disparities that may appear to burden one sex more than another are based on any "factor other than sex." As this Court remarked in contrasting the Equal

Pay Act with Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*:

> Title VII's prohibition of discriminatory employment practices was intended to be broadly inclusive, proscribing "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971). The structure of Title VII litigation, including presumptions, burdens of proof, and defenses, has been designed to reflect this approach. The fourth affirmative defense of the Equal Pay Act, however, was designed differently, to confine the application of the Act to wage differentials attributable to sex discrimination. Equal Pay Act litigation, therefore, has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a bona fide use of "other factors other than sex."

County of Washington v. *Gunther*, 452 U.S. 161, 170 (1981). Therefore, under the Equal Pay Act, courts are not permitted to "substitute their judgment for the judgment of the employer" and should not "judge the reasonableness or unreasonableness of [an employer's] differentiation among employees, except as it shows a clear pattern of discrimination" based on sex. 109 Cong. Rec. 9209, 9208 (1963) (remarks of Rep. Goodell, a "principal exponent on the Act"). *See County of Washington* v. *Gunther*, 452 U.S. at 170-171.

From the beginning, it was contemplated that the "factor other than sex" defense would encompass transfer pay practices similar to the one involved in this case. For example, the House Report expressly stated that the defense

> recognizes certain special circumstances, such as "red circle rates." This term is borrowed from War Labor Board parlance and describes certain unusual, higher than normal wage rates which are maintained for many valid reasons. For instance, it is not un-

> common for an employer who must reduce help in a skilled job to transfer employees to other less demanding jobs but to continue to pay them a premium rate in order to have them available when they are again needed for their former jobs.

H.R. Rep. No. 309, *supra*, at 3. Similarly, a regulation promulgated by the Department of Labor shortly after passage of the Equal Pay Act recognized "red-circling" as a factor other than sex. The regulation stated that "[u]nder the 'red circle' principle the employer may continue to pay the employee his or her present salary, which is greater than that paid to the opposite gender employees, for the work both will be doing." 29 C.F.R. § 1620.26(a).

The Eleventh Circuit's decision conflicts with this accepted understanding of the Equal Pay Act and contradicts the very concept of "wage retention," of which "red-circling" is but one example. The court below stated that it would allow such practices *only* "when the disparity results from unique characteristics of the same job; from an individual's experience, training, or ability; or from special exigent circumstances connected with the business." App., *infra*, 8a. Uniform transfer pay practices, including "red-circle" rates, however, are by definition anomalous and unrelated to the job in question or the employee's ability to perform the job. Indeed, the federal regulation concerning "red-circle" rates gives a specific example that would not meet the Eleventh Circuit's definition: an employee who is transferred to a lower-paying job because he is no longer able to perform his previous job due to ill health. 29 C.F.R. § 1620.26(a). In that case, as in most other transfer pay situations, the disparity in pay is due not to the characteristics of the job or the individual employee's experience, training or ability, but rather to the personal circumstance of the employee being transferred. Unless that personal circumstance is based on sex, such differential treatment does not violate the Equal Pay Act.

2. In light of the statutory language, the legislative history and the applicable federal regulation, it is hardly surprising that the only court of appeals previously to decide the very issue presented in this case held that an employer's "salary retention policy qualifies as a factor other than sex." *Covington* v. *Southern Illinois University*, 816 F.2d 317, 322 (7th Cir.), cert. denied, 108 S. Ct. 146 (1987). In that case, the plaintiff claimed that the university paid her less than it paid her male predecessor in the position of art advisor. The university admitted the pay disparity, but contended that the former art advisor had transferred to that position from a higher-paying teaching position. The university followed the practice of not reducing the pay of faculty members who transferred to lower-paying jobs.

The Seventh Circuit held that the university's employment practice did not violate the Equal Pay Act, rejecting the claim that "factors other than sex * * * are limited either to business-related reasons or, more narrowly, to factors that relate to the requirements of the job or to the individual's performance of that job." 816 F.2d at 321. The court held that the Act does *not* prohibit salary differentials based on the previous salary paid by the same employer, "unless this policy is discriminatorily applied or unless there is evidence independent of the policy which establishes that the employer discriminates on the basis of sex." *Id.* at 323.

The Eleventh Circuit reached precisely the opposite conclusion in this case. Even though there was no finding that GM's transfer pay policy was discriminatorily applied or that pay rates for "follow-up" positions were set on the basis of sex, the Eleventh Circuit held that GM's practice violated the Equal Pay Act. Even though the Act expressly permits pay differentials based on any "factor other than sex," the Eleventh Circuit flatly held that "prior salary alone cannot justify pay disparity." App., *infra*, 9a. And even though Congress designed the

"factor other than sex" defense to be a broad, "catchall provision," the Eleventh Circuit announced that it "applies [only] when the disparity results from unique characteristics of the same job; from an individual's experience, training, or ability; or from special exigent circumstances connected with the business." *Id.* at 8a. In sum, even though the Act clearly was intended to permit nondiscriminatory wage practices, the Eleventh Circuit concluded that GM violated the Act simply because, in one small department, its sex-neutral transfer pay practice fortuitously resulted in men being paid more than women.

In all of these respects, the Eleventh Circuit's construction of the Equal Pay Act is in direct conflict with the Seventh Circuit, as the court below conceded (App., *infra*, 9a):

> We recognize that our holding may contradict the Seventh Circuit's holding in *Covington v. Southern Illinois University*, 816 F.2d 317 (7th Cir.) * * *. The flaws of the *Covington* decision are that the Seventh Circuit implicitly used the market force theory to justify the pay disparity and that the Seventh Circuit ignored congressional intent as to what is a "factor other than sex." Consequently, we reject *Covington* because it ignores that prior salary alone cannot justify pay disparity.

3. The Eleventh Circuit's assertion that the *Covington* decision, or GM's defense in this case, relied on the "market force theory" is inexplicable. The market force theory holds that it is permissible to pay women less than men because they are willing to work for lower wages. See *Corning Glass Works* v. *Brennan*, 417 U.S. at 204-205. But Southern Illinois University did not pay the male art advisor more than it paid Covington because she was willing to work for less. It paid him more because he had transferred from a higher-paying job, just as it would have continued to pay Covington her higher salary if

she had transferred to a lower-paying job. By the same token, GM did not pay plaintiffs less than their male counterparts because they were willing to work for lower wages. Rather, it paid them less because the men happened to have transferred from higher-paying hourly jobs, just as it paid women more than their male counterparts when those women transferred from hourly jobs to lower-paying salaried positions. GM's practice thus bears no resemblance to the discredited market force theory, and GM has never relied on that theory.

The district court and, to a lesser extent, the court of appeals also relied on the fact that GM did not show that it had a consistent, company-wide, written policy of not reducing wages when hourly employees transferred to salaried positions. Instead, the courts found, individual company officials declined to reduce the pay of the hourly workers because they believed, in good faith, that such a policy existed. See App., *infra*, 7a & n.8, 38a-39a n.4.[4] But whether the pay decisions were made pursuant to company policy (as GM maintains) or in accordance with the good-faith belief of individual officials that such a policy existed (as the courts below found), the undisputed fact is that the pay decisions were based on the prior salary of the transferred workers and were *not* based on sex. Accordingly, the practice did not violate the Equal Pay Act.

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[4] Petitioner does in fact have such a policy. The testimony of GM officials involved in setting salaries, Tr. Vol. 3 at 94-95, 198, and defendant's Exhibit No. 2, a 1975 internal GM report discussing the transfer pay policy, demonstrate the existence of a clear, consistently enforced, unwritten policy. The legislative history of the Equal Pay Act emphasizes that a practice or policy need not be in writing to qualify as a "factor other than sex." See 109 Cong. Rec. 9203, 9208 (1963) (statements of Reps. Griffin, Fountain, Goodell and Waggoner).

4. Whether employment practices such as that followed by GM in this case are properly based on a "factor other than sex" under the Equal Pay Act is a frequently-recurring question of federal law. The Eleventh Circuit's decision conflicts not only with the Seventh Circuit's decision in *Covington* but also with decisions of several district courts on similar issues. See *Groussman* v. *Respiratory Home Care, Inc.*, 40 Fair Empl. Prac. Cas. (BNA) 122, 123, 125-126 (C.D. Cal. 1986); *Derouin* v. *Louis Allis Div.*, 618 F. Supp. 221, 223-225 (E.D. Wis. 1984) (the employer's practice of limiting promotional salary increases to "a specified percentage (10%-20%) of the employee's present salary" was based on a factor other than sex); *Grove* v. *Frostburg Nat'l Bank*, 549 F. Supp. 922, 937 (D. Md. 1982) (the "practice of not reducing salaries when employees were transferred or their job assignments changed" was based on a factor other than sex); *EEOC* v. *Samedan Oil Corp.*, 29 Empl. Prac. Dec. (CCH) ¶ 32,901 at 26,268 (E.D. Okla. 1982) (a "company policy not to reduce salaries when employees are demoted from a higher paying job to a lower paying one" rested on a factor other than sex); *Mangiapane* v. *Adams*, 20 Fair Empl. Prac. Cas. (BNA) 699, 700-701 (D.D.C. 1979), affirmed, 24 Empl. Prac. Dec. (CCH) (D.C. Cir. 1980) (a federal government decision to "red-circle" employees when their positions were downgraded from GS-13 to GS-12 was based on a factor other than sex); *Marshall* v. *Liggett & Myers, Inc.*, 22 Empl. Prac. Dec. (CCH) ¶ 30,591 at 14,184 (M.D.N.C. 1979), affirmed in part and vacated in part on other grounds, 690 F.2d 1072 (4th Cir. 1982) (a "company's practice of continuing to pay the same wage to employees who transfer from higher to lower paying positions" was based on a factor other than sex). See also *Adams* v. *University of Washington*, 106 Wash. 2d 312, 722 P.2d 74, 77-82 (1986) (interpreting state legislation "virtually identical to" the Equal Pay Act to hold that an employer's practice of not reducing the salaries of printers whose skills had

become obsolete when they were transferred to lower-paying jobs was a factor other than sex).

Beyond this, the Eleventh Circuit's decision cannot be reconciled with the reasoning of the Ninth Circuit in *Kouba* v. *Allstate Ins. Co.*, 691 F.2d 873 (1982), or the Fourth Circuit in *EEOC* v. *Aetna Ins. Co.*, 616 F.2d 719 (1980). In *Kouba*, the employer argued that its policy of considering the previous salary paid to employees by *another* employer justified a pay disparity. In such a case, it is of course far more difficult for the new employer (or for a court) to determine whether the prior salary itself was based on sex. Nevertheless, the Ninth Circuit held that "the Equal Pay Act does not impose a strict prohibition against the use of prior salary." *Id.* at 878. The Ninth Circuit determined that in order to find that Allstate's use of prior salary violated the Act, "the [district] court must find that the business reasons given by Allstate do not reasonably explain its use of that factor * * *." *Ibid.*

In this case, there was *no* finding that GM took sex into account in setting salaries, approving transfers, or deciding whether to continue to pay a transferred employee at his or her previous wage rate. Yet the Eleventh Circuit rejected the company's defense without even considering whether "the business reasons given by [GM] reasonably explain its use of [prior salary]." *Kouba* v. *Allstate Ins. Co.*, 691 F.2d at 878. GM stated that it followed its transfer pay practice in order "to encourage people to move out of hourly wage jobs into salaried tracks * * *." App., *infra*, 6a. Consistent with the Ninth Circuit's ruling, the Eleventh Circuit should have considered whether GM's stated reason reasonably explained its practice. The court below refused to do so and instead flatly held that "prior salary alone cannot justify pay disparity." *Id.* at 9a.

In *EEOC* v. *Aetna Ins. Co.*, a six-year employee claimed that the company paid a newly-hired man more

than it paid her for the same work. The employer contended that the pay disparity was justified on two grounds. First, the company asserted that it had "two distinct and separate merit systems: one for incoming employees; and another for persons already employed at the company." 616 F.2d at 722. The system for incoming employees was regularly reviewed and upgraded in order to attract the best prospects, but the system for existing employees was not regularly readjusted. Second, the employer contended that the man's higher salary was justified by his "ability and more substantial prior underwriting and managerial experience * * *." *Ibid.*

The Fourth Circuit held that both of the employer's justifications were "factor[s] other than sex" under the Equal Pay Act. It concluded that "the differential was attributable to the existence of two distinct salary programs" and "by [the man's] experience and background * * *." 616 F.2d at 726. In this case, GM also had separate pay systems, one for hourly employees, and the other for salaried employees. Because neither system was based on sex, the Eleventh Circuit's holding that GM violated the Act is inconsistent with the Fourth Circuit's holding that Aetna did not violate the Act.

This disagreement between the Eleventh Circuit and numerous other courts on a recurring and important question of federal law requires this Court's resolution. As we explain at pages 23-26, *infra*, the unsettled state of the law casts doubt upon a sex-neutral employment practice common throughout the United States. Companies such as GM, with operations nationwide, are in a particularly difficult position when their practices appear to violate federal law in one circuit but to be lawful in others. This Court should grant review to settle the matter.

B. *The court of appeals' application of a three-year statute of limitations conflicts with this Court's decision in Richland Shoe.*

The Equal Pay Act was enacted as an amendment to the Fair Labor Standards Act ("FLSA"), and the procedural and remedial provisions of the latter Act apply. 29 U.S.C. § 255(a) provides that Equal Pay Act cases must be brought "within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued."

Prior to this Court's recent decision in *McLaughlin* v. *Richland Shoe Co.*, 108 S. Ct. 1677 (1988), there was a conflict among the circuits as to the meaning of the term "willful" in Section 255(a). Several circuits applied the standard first articulated by the Fifth Circuit in *Coleman* v. *Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (1971), cert. denied, 409 U.S. 948 (1972), which regarded a violation as willful if the employer knew that the federal Act was "in the picture." Other courts followed the approach established by this Court in a different context in *Trans World Airlines* v. *Thurston*, 469 U.S. 111 (1985), which considered a violation to be willful only if the employer " 'knew or *showed reckless disregard for the matter of whether* its conduct was prohibited by the FLSA.' " *McLaughlin* v. *Richland Shoe Co.*, 108 S. Ct. at 1680 (emphasis in the original).

Last Term, this Court rejected the *Jiffy June* standard and held that the *Thurston* "reckless disregard" standard applied to FLSA cases. *McLaughlin* v. *Richland Shoe Co.*, 108 S. Ct. at 1682. The Court emphasized that neither negligence nor unreasonableness is enough to meet this standard of willfulness. Thus, the Court expressly rejected a definition proposed by the Secretary of Labor that would have "permit[ted] a finding of willfulness to be based on nothing more than negligence, or, perhaps, on a completely good-faith but incorrect assumption that a

pay plan complied with the FLSA in all respects." *Ibid.* As the Court explained (*id.* at 1682 n.13):

> If an employer acts reasonably in determining its legal obligation, its action cannot be deemed willful under either [the Secretary's] test or under the standard we set forth. If an employer acts unreasonably, but not recklessly, in determining its legal obligation, then, although its action would be considered willful under [the Secretary's] test, it should not be so considered under *Thurston* or the identical standard we approve today.

The lower courts in this case, acting prior to the *Richland Shoe* decision, applied the now-repudiated *Jiffy June* "in the picture" standard and held that GM's conduct was willful. App., *infra*, 12a, 31a. That ruling is plainly no longer tenable. In the alternative, the courts also held that GM's conduct was willful under the *Thurston* standard, but in doing so they clearly misconstrued that standard. First, the district court held, and the court of appeals agreed, that GM acted recklessly under *Thurston* because it did not

> make a "reasonable effort to determine whether the plan [it was] following would constitute a violation of the law." * * * General Motors chose to ignore clear signs that its practices were illegal. A violation rises to the level of reckless disregard when an employer has the resources to conform its conduct to the law, but declines to make the effort.

App., *infra*, 37a-39a (footnotes omitted); see also *id.* at 13a. Second, the court of appeals held that GM violated the "reckless disregard" standard because it "sought to rely on the market force theory, a theory long discredited by this Court and the Supreme Court." *Ibid.*

These interpretations of the *Thurston* "reckless disregard" standard cannot be squared with this Court's subsequent ruling in *Richland Shoe*. The Court made it crystal clear in *Richland Shoe* that an employer does *not*

act "willfully" simply because it has not made a reasonable effort to determine its legal obligations. 108 S. Ct. at 1682 & n.13. Indeed, it is completely anomalous to hold, on the one hand, that GM acted willfully and recklessly while acknowledging, on the other hand, that its legal position was accepted by *the only appellate decision to consider the very issue.* See App., *infra*, 9a. The Eleventh Circuit's finding of "reckless disregard" is even more untenable given the support for GM's legal position in the decisions of several other courts. See cases cited at page 16, *infra;* see also *Blocker* v. *AT & T Technology Systems*, 666 F. Supp. 209, 214 (M.D. Fla. 1987) ("[d]efendants' policy of paying transferred, qualified employees whose position has been eliminated their previous salary is not based upon sex * * * and * * * fits within the 'factor other than sex' exception to the Equal Pay Act").

In fact, the Eleventh Circuit held that GM recklessly disregarded its legal obligations even though no other federal court had ever held that a transfer pay practice like GM's was unlawful. And it held that GM acted recklessly even though there was no evidence of reckless conduct in the record. To the contrary, the record demonstrates—and the district court twice found (App., *infra*, 31a, 40a)—that GM officials acted in the good faith belief that they were following a valid company policy. A holding that such conduct is "reckless" would "permit a finding of willfulness to be based on nothing more than negligence, or * * * on a completely good-faith but incorrect assumption that [the employer's conduct] complied with the [Act] in all respects." 108 S. Ct. at 1682. It would once again "virtually obliterate[] any distinction between willful and nonwillful violations." *Id.* at 1681. This Court rejected that standard in *Richland Shoe* and should do so here as well.[5]

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[5] If this were the only issue presented by this case, it would be appropriate for the Court to grant the petition, summarily vacate

C. *The court of appeals' decision that plaintiffs were entitled to double damages conflicts with this Court's decision in Richland Shoe.*

An employer who violates the Equal Pay Act must pay the plaintiff an amount representing lost wages plus "an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). However, another provision of the statute gives the district court discretion not to award liquidated damages "if the employer shows to the satisfaction of the court that [his conduct] was in good faith and that he had reasonable grounds for believing that his [conduct] was not a violation of the [Act]." 29 U.S.C. § 260.

Both courts below held that the district court was required by statute to award liquidated damages in this case because GM did not act in good faith. App., *infra*, 13a-14a, 40a-41a ("[t]he court concludes that it has no choice but to award liquidated damages"). This ruling was closely intertwined with the decision on the statute of limitations issue: the determination that GM had willfully violated the Act by relying on a "discredited" legal theory "preclude[d] a finding of good faith on the part of GM." *Id.* at 14a n.14.

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the court of appeals' decision, and remand for reconsideration in light of *Richland Shoe*. The Court recently vacated and remanded for reconsideration in light of *Richland Shoe* two Seventh Circuit decisions that interpreted *Thurston* similarly to the district court in this case. *Coston* v. *Plitt Theatres, Inc.*, 831 F.2d 1321, 1327 (7th Cir. 1987) (a violation is willful if the employer "knew or reasonably should have known that its actions were in violation of the law"), vacated and remanded, 108 S. Ct. 1990 (1988); *Rengers* v. *WCLR Radio Station*, 825 F.2d 160, 166 (7th Cir. 1987), vacated and remanded, 108 S. Ct. 1990 (1988). But because the case raises other issues warranting plenary review, we believe that the Court should grant the petition to make clear that a finding of willfulness requires a showing of recklessness, not merely one of negligence, unreasonableness or good-faith error.

We doubt that a finding that an employer acted willfully should in every case preclude a finding of good faith. But even if it did, because the court of appeals' holding that GM acted willfully conflicts with this Court's decision in *Richland Shoe*, the conclusion that GM, *ipso facto*, did not act in good faith conflicts with *Richland Shoe* as well. This Court should grant the petition to conform the Eleventh Circuit's liquidated damages ruling to the legal standard announced in *Richland Shoe*.

II. The Court Of Appeals' Decision Threatens To Disrupt The Settled Practice Of Employers Throughout The Country

The impact of the Eleventh Circuit's decision goes far beyond GM and its transfer pay practice. Thousands of employers throughout the country utilize transfer pay and other wage retention practices for many legitimate reasons. By their nature, every such practice will result in some employees being paid more than others for the same work. Particularly when small employers are involved, or when courts focus on small subdivisions of large companies (such as GM's nine-employee unit involved in this case), such practices may at times result in pay disparities between men and women. But those disparities are not based on sex. They are based on sex-neutral practices that benefit employees of both sexes (by allowing them to change jobs without loss of pay) and that benefit employers (by helping them to fill job vacancies).

The Eleventh Circuit's decision subjects employers to liability under the Equal Pay Act even though they have acted in good faith and in a nondiscriminatory manner. And the potential liability is substantial: back pay, plus an equal amount of liquidated damages, plus attorneys' fees. To avoid that liability, employers will have little choice but to abandon beneficial, nondiscriminatory transfer pay practices.

The decision below leaves GM, and thousands of similarly-situated employers, with no reasonable alternative. If forced to abandon its transfer pay policy, a company could require all employees who transfer into lower-paying jobs to take a pay cut. But few employees would accept a transfer under such conditions. Or the company could prohibit employees from transferring into lower-paying jobs. But that would leave jobs unfilled, or at least prevent the best people from filling them. Or it could preserve the present practice but then readjust the salaries of all the other employees when an employee transfers into a lower-paying job. But that would be extraordinarily expensive and would make the company reluctant to transfer higher-paid employees (leaving them in dead-end jobs). None of these outcomes would advance any of the purposes of the Equal Pay Act.

GM followed its transfer pay practice in good faith in order to encourage employees to transfer from hourly wage jobs into salaried positions.[6] Other companies follow similar practices for a variety of reasons, including to accommodate employees who can no longer perform their regular jobs,[7] to ease the burden on employees during times of economic contraction,[8] to allow minority employees to move into career tracks with better promotional opportunities,[9] or to bolster morale and ease the

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[6] This serves a legitimate purpose, as evidenced by the fact that many employers have sought to move all of their employees into salaried positions. See Hulme & Bevan, *The Blue Collar Worker Goes on Salary*, 52 Harv. Bus. Rev. 104 (1975).

[7] See 29 C.F.R. § 1620.26(a).

[8] See, *e.g.*, Wallace, *Industrial Relations in a Job-Loss Environment*, 31 Lab. L. J. 473, 476 (1980).

[9] See, *e.g.*, *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 247-248 & n.99 (5th Cir. 1974), cert. denied, 439 U.S. 1115 (1979) ("Red circling is a standard remedy for eliminating past discrimination which prevented employees from reaching higher jobs and is recognized as necessary since otherwise employees could not afford

burden on employees who are demoted.[10]

Experts in the field of compensation administration acknowledge that a "cluster of special situations" warrant "red-circle" and other income maintenance practices. T. Patten, *Pay: Employee Compensation and Incentive Plans* 285 (1977). See also D. Belcher & T. Atchison, *Compensation Administration* 413 (2d ed. 1987); R. Henderson, *Compensation Management: Rewarding Performance* 443 (2d ed. 1979); R. Sibson, *Compensation* 83-84 (American Management Associations 1974) (examining a variety of circumstances under which higher-than-normal "red-circle," "gold-circle," and "silver-circle" rates apply). A recent study of financial institutions in the Southwest demonstrates that "red-circle" practices are quite common; over 70% of the administrators who responded to a survey had at least some "red-circled" employees at the time. Reed & Kroll, *Red-Circle Employees: A Wage Scale Dilemma*, 66 Personnel Journal 92 (Feb. 1987).

The Eleventh Circuit's decision creates intolerable uncertainty as to the legality of this very common practice. GM has over 875,000 employees.[11] As the cases demonstrate, other large employers (including the federal government), and thousands of smaller ones, follow prac-

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to take *training* jobs paying lower wages"); *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354, 375-376 (8th Cir. 1973) (employees who transfer "shall not be paid at a lower hourly rate than that which he received on the job from which he transferred"); *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652, 660 (2d Cir. 1971) ("Rate retention * * * ha[s] been used to correct continuing discriminatory effects"). See also 8 Employment Coordinator (Research Inst. Am.) 81,516 (1988) ("'red circling' is a necessary element of a Title VII remedy in many cases"); E.E.O.C. *Conciliation Standards* § 632.6 (1973), *reprinted in* 2 EEOC Comp. Man. (BNA) 910:0002 (1975).

[10] See, *e.g.*, D. Belcher & T. Atchison, *Compensation Administration* 413 (2d ed. 1987).

[11] 1 *Moody's Industrial Manual* 1325 (1987).

tices similar to the one invalidated in this case.[12] These employers need uniform rules; they cannot tailor their employment practices to suit the Eleventh Circuit. Thus, the decision below will force them to abandon perfectly legitimate, sex-neutral practices, which are beneficial to employers and employees alike. That unfortunate result should not be allowed to occur without this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES A. POWELL, III
BARRY V. FREDERICK
Powell, Tally & Frederick
Suite 700
New South Federal Bldg.
21 First Avenue North
Birmingham, AL 35203
(205) 324-4996

KENNETH S. GELLER *
STEPHEN M. SHAPIRO
JAMES D. HOLZHAUER
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

DAVID M. DAVIS
MARK R. FLORA
General Motors Corporation
Office of General Counsel
3031 West Grand Boulevard
Detroit, MI 48202
(313) 556-5000

* *Counsel of Record*

AUGUST 1988

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[12] See, *e.g.*, *Blocker* v. *AT & T Technology Systems*, 666 F. Supp. at 214; *Mangiapane* v. *Adams*, 20 Fair Empl. Prac. Cas. (BNA) at 700-701; *Marshall* v. *Liggett & Myers, Inc.*, 22 Empl. Prac. Dec. (CCH) at 14,184; *Adams* v. *University of Washington*, 722 P.2d at 78-82.

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 87-7171

SHEILA ANN GLENN, PATRICIA F. JOHNS, and ROBBIE NUGENT,
Plaintiffs-Appellees,

v.

GENERAL MOTORS CORPORATION,
Defendant-Appellant,

SAGINAW STEERING GEAR DIVISION,
Defendant.

April 15, 1988

Appeal from the United States District Court
for the Northern District of Alabama

Before JOHNSON and CLARK, Circuit Judges, and DUMBAULD*, Senior District Judge.

JOHNSON, Circuit Judge:

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* Honorable Edward Dumbauld, Senior U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

Sheila Ann Glenn, Patricia Johns, and Robbie Nugent filed suit against General Motors Corporation (GM) and its Saginaw Steering Gear Division, alleging violation of the Equal Pay Act.[1] The United States District Court for the Northern District of Alabama found for the appellees and awarded damages. *See Glenn v. General Motors Corp.*, 658 F.Supp. 918 (N.D.Ala. 1987). GM [2] timely appeals the district court's (1) determination that the appellees proved a prima facie case of gender discrimination, (2) rejection of GM's affirmative defense of a "factor other than sex" as the reason for the pay disparity, (3) determination that the willful character of GM's actions required application of the three-year, rather than two-year statute of limitations, (4) determination that an award of liquidated damages was appropriate, and (5) award of expenses. We affirm in part, and reverse and remand in part.

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[1] The Equal Pay Act of 1963 provides in relevant part:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

29 U.S.C.A. § 206(d)(1).

[2] The Equal Employment Advisory Council, substantially composed of employers subject to the Equal Pay Act, filed a brief amicus curiae in support of GM's position.

1. *Prima Facie Case*

"In order to make out a case under the Act, the [appellees] must show that an employer pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.'" *Corning Gass Works v. Brennan*, 417 U.S. 188, 195, 94 S.Ct. 2223, 2228, 41 L.Ed.2d 1 (1974) (quoting 29 U.S.C.A. § 206(d)(1)); *accord Brock v. Georgia Southwestern College*, 765 F.2d 1026, 1032 (11th Cir.1985).

The three appellees are employed in the Materials Management Department (previously Tool Stores Department) of the Saginaw Division of GM in three different plants near Athens, Alabama. The appellees currently work in the positions of Materials Management Expediter and Materials Follow-up Clerk, previously designated Follow-up and Associate Follow-up Tool and Die respectively. A follow-up basically ensures that adequate supplies of tools and operating materials are on hand in the GM plants to meet the minimum levels necessary to keep the plants running. Normally, each plant has three follow-ups, although GM has used less than three at times. Up to the time of suit, four women, including the appellees, (as well as men) had worked in the follow-up position. Appellee Nugent was hired in 1975, the first person to hold a follow-up position.[3]

No doubt exists that through 1985 all three appellees earned less than all their male comparators in the follow-up position in the Tool Stores Department. In fact, the most highly paid appellee made less through 1985 than the lowest paid man.[4] In addition, all the appellees re-

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[3] We take the facts set forth in this paragraph from the district court's opinion. *See* 658 F. Supp. at 920.

[4] In 1985 the monthly salaries (along with gender and starting date as a follow-up) were: Stephen Downs (man, Feb. 1977)

ceived lower starting salaries as compared to those received by men hired near the same time.[5]

GM argued at trial, and argues in its brief on appeal, that the follow-up positions held by the female appellees were not the same follow-up positions as held by their male comparators.[6] Specifically, GM argues that the male follow-ups who handle items ordered from blueprints need different skills than those follow-ups, including the appellees, who do not. The district court rejected this distinction:

$2775; Jerry Pepper (man, July 1981) $2740; Billy White (man, April 1981) $2600; Harold Wales (man, Jan. 1981) $2485; Robbie Nugent (woman, 1975) $2385; Sheila Ann Glenn (woman, Feb. 1981) $2370; and Patricia Johns (woman, Feb. 1981) $2271. *See* 658 F. Supp. at 920-22.

[5] Robbie Nugent (woman) made $600/month when she started in 1975. Richard Tanley (man) started two months later and made $660/month. Sheila Ann Glenn (woman) and Patricia Johns (woman) had monthly salaries of $1441.44 and $1316.64 respectively when they started in February 1981. Billy White (man) started two months later with a salary of $1656.46 per month. *See* 658 F. Supp. at 920-22.

[6] GM did not take this position at the start of the case. In its Dec. 20, 1983 answer, GM stated, "The defendant admits that male and female 'followups' perform the same work. . . ." On April 1, 1986, GM filed an amended answer, stating that "[t]he defendant denies that the jobs occupied by the plaintiffs are the same or substantially the same as jobs occupied by the males to whom they compare themselves."

Although GM contested this issue in its brief on appeal, GM appeared to abandon its challenge on this issue at oral argument. At oral argument, GM's counsel stated, "This case is, as I've said, brought under the Equal Pay Act by three ladies who contend that they made less money for doing the same work than men who were —who were under the same job titles. That contention is correct. We've never denied that." In addition, when GM's counsel listed the issues on appeal at oral argument, he did not include a challenge to whether the appellees had proved a prima facie case. Nonetheless, we address the merits of this contention.

> The court finds that for all purposes material to this case the positions of Blueprint Follow-Up and Follow-up are identical. The court notes that GM has never treated Follow-Ups differently for compensation purposes on the basis of items handled. When plaintiff Nugent handled blueprint items, for example, she still made less than a male Follow-Up who did not. Some of the men handling blueprint items currently make less money than other men who do not work with blueprint items.

658 F.Supp. at 923. Consequently, the district court concluded that the appellees had proved a prima facie case.

Appellate review examines whether this determination was "clearly erroneous." *Georgia Southwestern*, 765 F.2d at 1033. Under the "clear error" standard of review, evidence in the record as a whole does not indicate that the blueprint reading, even if it is an actual distinction, makes the jobs not "substantially equal." *See id.* at 1032 ("The jobs held by employees of opposite sexes need not be identical, rather, they must only be 'substantially equal.' It is important to bear in mind that the prima facie case is made out by comparing the *jobs* held by the female and male employees and showing that these jobs are substantially equal, not by comparing the skills and qualifications of the individual employees holding those jobs." (citations and footnote omitted) (emphasis in original)).

II. *GM's Affirmative Defense*

Once the appellees established a prima facie case, the burden shifted to GM to prove that the difference in pay was justified by one of the four exceptions in the Equal Pay Act: (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any factor other than sex. 29 U.S.C.A. § 206(d)(1); *see*

Corning Glass Works, 417 U.S. at 196, 94 S.Ct. at 2229; *Georgia Southwestern*, 765 F.2d at 1036.

GM seeks to justify the pay disparity on the fourth ground—a "factor other than sex." From 1977 to its first collective bargaining agreement with the United Auto Workers (UAW) in 1982, GM, in an attempt to maintain a nonunion Alabama production force, set hourly wages at levels of parity with the national UAW contract in other locations.[7] Prior to 1977, another hourly wage schedule applied to all hourly employees, regardless of gender.

In the present case, Nugent was hired "off the street" as a salaried follow-up. Glenn and Johns transferred from their salaried secretarial positions. In contrast, the male comparators transferred from hourly wage jobs. GM contends that to encourage people to move out of hourly wage jobs into salaried tracks, it maintains a longstanding, unwritten, corporate-wide policy against requiring an employee to take a cut in pay when transferring to salaried positions such as those at issue in the present case. GM thus argues that this "policy" constitutes a "factor other than sex" and legitimizes the pay disparity.

The district court found that the "policy" suffered from a fatal flaw:

> [T]his so-called salary "policy" is in fact not a policy at all, but merely one aspect of a practice. In practice GM simply pays Follow-Ups what it takes to induce them to accept the employment. The court notes that historically companies may and do hire women at lower starting salaries. The court is thus

[7] Since 1982, the hourly wage rates are governed by the collective bargaining agreement between GM and the UAW. The collective bargaining agreement is irrelevant to the present case because all of the female appellees and the male comparators became follow-ups before 1982.

> unconvinced of GM's attempted justification for the pay disparity. The three female plaintiffs are being paid less money than their male counterparts for equal work without justification.

658 F.Supp. at 924. Consequently, the district court held that GM had failed to prove an affirmative defense justifying the pay disparity.[8]

We affirm the district court. GM seeks to defend the pay disparity as a result of the market force theory. This Court and the Supreme Court have long rejected the market force theory as a "factor other than sex": "[T]he argument that supply and demand dictates that women *qua* women may be paid less is exactly the kind of evil that the [Equal Pay] Act was designed to eliminate, and has been rejected." *Georgia Southwestern*, 765 F.2d at 1037 (citing *Corning Glass Works*, 417 U.S. at 205, 94 S.Ct. at 2233 ("The differential arose simply because men would not work at the low rates paid women inspectors, and it reflected a job market in which Corning could pay women less than men for the same work. That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work."); *Brennan v. Victoria Bank & Trust Co.*, 493 F.2d 896, 902 (5th Cir.1974) (market force theory that a woman will work for less than a man is not a valid consideration under the Equal Pay Act); *Brennan v. City Stores, Inc.*, 479 F.2d 235, 241 n. 12 (5th Cir.1973)

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[8] GM argues that the district court erred by requiring that the "policy" be in writing to qualify as an affirmative defense. We do not read the district court's language, *see* 658 F. Supp. at 923-24, as relying on the absence of a writing per se. Rather, we read the district court as concluding that the absence of a writing in the context of other written policies provides independent support for its finding that the "policy" was, in fact, an illegal practice.

(same); *Hodgson v. Brookhaven General Hosp.*, 436 F.2d 719, 726 (5th Cir.1970) (same)).

GM argues that the legislative history supports its contention that prior salary can be a "factor other than sex." Under the facts of the present case, GM's argument is without merit. The relevant legislative history provides:

> Three specific exceptions and one broad general exception are also listed. It is the intent of this committee that any discrimination based upon any of these exceptions shall be exempted from the operation of this statute. As it is impossible to list each and every exception, the broad general exclusion has also been included. Thus, among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability would also be excluded. It also recognizes certain special circumstances, such as "red circle rates." This term is borrowed from War Labor Board parlance and describes certain unusual, higher than normal wage rates which are maintained for many valid reasons. For instance, it is not uncommon for an employer who must reduce help in a skilled job to transfer employees to other less demanding jobs but to continue to pay them a premium rate in order to have them available when they are again needed for their former jobs.

H.R. Rep. No. 309, 88th Cong., 1st Sess. 3, *reprinted in* 1963 U.S. Code Cong. & Admin. News 687, 689.

The legislative history thus indicates that the "factor other than sex" exception applies when the disparity results from unique characteristics of the same job; from an individual's experience, training, or ability; or from special exigent circumstances connected with the business. The pay disparity at issue here does not result

from any of these reasons. Consequently, resort to the legislative history does not support GM's position, but rather buttresses the district court's conclusion that a "factor other than sex" does not explain the pay disparity.

We recognize that our holding may contradict the Seventh Circuit's holding in *Covington v. Southern Illinois University*, 816 F.2d 317 (7th Cir.), *cert. denied*, —— U.S. ——, 108 S.Ct. 146, 98 L.Ed.2d 101 (1987). In *Covington*, the defendant university argued that its salary retention policy, its financial emergency, and the male comparator's education and experience justified the pay disparity. The Seventh Circuit agreed with the university, and examined whether the salary retention policy alone could be a "factor other than sex."

The university had a sex-neutral policy of maintaining an employee's salary upon a change of assignment within the university. Covington argued that

> factors other than sex for purposes of the [Equal Pay Act] . . . are limited either to business-related persons or, more narrowly, to factors that relate to the requirements of the job or to the individual's performance of that job. Covington contend[ed] that [the university]'s policy of retaining the salary of employees who change assignments does not fall within either of these categories.

816 F.2d at 321. The Seventh Circuit rejected Covington's argument. The flaws of the *Covington* decision are that the Seventh Circuit implicitly used the market force theory to justify the pay disparity and that the Seventh Circuit ignored congressional intent as to what is a "factor other than sex." Consequently, we reject *Covington* because it ignores that prior salary alone cannot justify pay disparity.[9]

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[9] Contrary to GM's gloss, *Kouba v. Allstate Ins. Co.*, 691 F.2d 873 (9th Cir. 1982), does not stand for the proposition that prior salary

III. *Statute of Limitations*

The applicable statute of limitations for the present case is provided in 29 U.S.C.A. § 255(a): "[E]very [cause of] action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued." The district court first determined that under the *Jiffy June* "in the picture" standard,[10] GM's actions were willful. 658 F. Supp. at 926.

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alone can justify pay disparity. In *Kouba*, the Ninth Circuit held that "the Equal Pay Act does not impose a strict prohibition against the use of prior salary." *Id.* at 878. The Ninth Circuit added that "while we share the district court's fear that an employer might manipulate its use of prior salary to underpay female employees, the [district] court must find that the business reasons given by [defendant] Allstate do not reasonably explain its use of the factor before finding a violation of the Act." *Id.* Allstate had claimed that it used prior salary to predict a new employee's performance as a sales agent. *Id.* The Ninth Circuit held that strict relevant considerations needed to be evaluated on remand to decide whether Allstate could rely on prior salary. *Kouba* is consistent with the present case because the Ninth Circuit would permit use of prior salary where the prior job resembled the sales agent position and where Allstate relied on other available predictors. In the present case, GM does not argue that the males' hourly wages serve to predict that males will be better follow-ups than the female appellees. Nor does the evidence in the record as a whole support that GM could resort to any other factor than the prior salary to justify the pay disparity.

Nor does *EEOC v. Aetna Ins. Co.*, 616 F.2d 719 (4th Cir. 1980), support GM's position. Contrary to GM's gloss, *Aetna* does not stand for the proposition that pay disparity is justified when it results from two distinct nondiscriminatory merit systems. Rather, the Fourth Circuit validated the differential because of the male comparator's experience and background. *Id.* at 726. In contrast, GM justifies the disparity on the basis of the systems alone, without record support that experience and background justify the pay disparity.

[10] This Court's predecessor examined the meaning of "willful" in *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139 (5th Cir. 1971),

GM does not contend that it met the *Jiffy June* "in the picture" standard, but rather argues that the Supreme Court disavowed that standard in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985). *Thurston* addressed the definition of "willful" for liquidated damages under the Age Discrimination in Employment Act. The Supreme Court rejected the *Jiffy June* standard and held that a violation was "willful" if "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Id.* at 128-29, 105 S.Ct. at 625. The Court, however, expressly did not determine if the "in the picture" standard was appropriate for statute of limitations purposes. *Id.* at 127-28, 105 S.Ct. at 624-25.[11]

After the Supreme Court decided *Thurston*, however, this Court applied the *Jiffy June* standard to the precise issue presented by this appeal (i.e., the definition of "willfulness" for a statute of limitations connected with an Equal Pay Act claim). *Georgia Southwestern*, 765 F.2d at 1038-39. GM seeks to avoid *Georgia Southwest-*

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cert. denied, 409 U.S. 948, 93 S.Ct. 292, 34 L.Ed.2d 219 (1972). The Court reasoned:

> The entire legislative history of the 1966 amendments of the [Fair Labor Standards Act] indicates a liberalizing intention on the part of Congress. Requiring employers to have more than awareness of the possible applicability of the FLSA would be inconsistent with that intent. Consequently, we hold that employer's decision to change his employees' rate of pay in violation of FLSA is "wilful" [sic] when, as in this case, there is substantial evidence in the record to support a finding that the employer knew or suspected that his actions might violate the FLSA. Stated most simply, we think the test should be: *Did the employer know the FLSA was in the picture?*

458 F.2d at 1142 (emphasis added).

[11] On October 5, 1987, the Supreme Court granted certiorari on this issue. *See Brock v. Richland Shoe Co.*, —— U.S. ——, 108 S.Ct. 63, 98 L.Ed.2d 27 (1987).

ern's binding character by pointing out, and correctly so, that this Court did not discuss *Thurston*'s impact in that case. Even if the lack of discussion concerning *Thurston* would allow us to examine the controlling character of *Georgia Southwestern*, we would adhere to the *Jiffy June* standard. The district court persuasively noted that the liquidated damages provision is punitive in nature, and that the statute of limitations has a restitutionary function. 685 F. Supp. at 926 n.1. Consequently, "willful" can have differing definitions based upon the underlying purpose of the provision.[12]

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[12] Our holding accords with the post-*Thurston* decisions of the First, Fourth, Ninth, and Tenth Circuits. *See Secretary of Labor v. Daylight Dairy Prods., Inc.*, 779 F.2d 784, 789 (1st Cir. 1985); *Donovan v. Bel-Loc-Diner, Inc.*, 780 F.2d 1113, 1117 (4th Cir. 1985); *Brock v. Shirk*, 833 F.2d 1326, 1329 (9th Cir. 1987); *Crenshaw v. Quarles Drilling Corp.*, 798 F.2d 1345, 1349-50 & 1350 n.6 (10th Cir. 1986).

Our holding conflicts with the post-*Thurston* decisions of the Second, Third, Fifth, and Seventh Circuits. *See Brock v. Superior Care, Inc.*, 840 F.2d 1054, —— (2d Cir. 1988); *Brock v. Richland Shoe Co.*, 799 F.2d 80 (3d Cir. 1986), *cert. granted*, —— U.S. ——, 108 S.Ct. 63, 98 L.Ed.2d 27 (1987); *Peters v. City of Shreveport*, 818 F.2d 1148, 1167-68 (5th Cir. 1987), *petition for cert. filed* (Oct. 19, 1987); *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 308-12 (7th Cir. 1986).

We recognize that the Fifth Circuit no longer adheres to *Jiffy June*, a decision binding on us in the Eleventh Circuit. In *Salazar-Calderon v. Presidio Valley Farmers Association*, 765 F.2d 1334 (5th Cir. 1985), *cert. denied*, 475 U.S. 1035, 106 S.Ct. 1245, 89 L.Ed.2d 353 (1986), the Court, in a case not involving the FLSA or a statute of limitations issue, remarked that *Thurston* overturned *Jiffy June*'s definition of willful. *Id.* at 1345. Seizing on this language, the Court held in *Peters*, a case addressing the statute of limitations under the Equal Pay Act, that *Salazar-Calderon*'s remark was controlling. 818 F.2d at 1167. *See Halferty v. Pulse Drug Co.*, 826 F.2d 2 (5th Cir. 1987) (*Peters* requires that panel vacate its earlier holding that *Jiffy June* required a three-year statute of limitations). We choose not to follow the Fifth Circuit's disapproval of *Jiffy June*, especially because the Fifth Circuit did not examine the restitutionary policy underlying the statute of limitations.

The district court alternatively held that GM failed *Thurston*'s reckless disregard standard. 658 F. Supp. at 927. We affirm the district court on this alternative ground as well. GM showed reckless disregard because, as noted above, GM sought to rely on the market force theory, a theory long discredited by this Court and the Supreme Court.[13]

IV. *Liquidated Damages*

Under 29 U.S.C.A. § 216(b), affected employees shall recover liquidated damages from their employer for violations of the Equal Pay Act. An employer may avoid the mandatory nature of an award of liquidated damages if the court chooses not to make an award where the employer shows its actions were in good faith and shows it had reasonable grounds for believing that those actions did not violate the Equal Pay Act. *See* 29 U.S.C.A. § 260.

The district court initially held that GM's violation of the Equal Pay Act was in good faith and predicated upon reasonable grounds. It therefore did not award liquidated damages. 658 F. Supp. at 925. The district court later awarded liquidated damages, determining that, although individual GM officials held a good faith belief that GM had adopted a transfer pay policy, GM lacked reasonable grounds to support a belief that its acts were in conformity with the law. *Id.* at 928.

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[13] Because of our holding we express no view on the merits of the district court's observation that

> [a]s an explanation for its conduct during settlement negotiations, General Motors has brought to this court's attention its policy of obtaining the resignation of employees who file discrimination claims as a condition precedent to settlement. This court feels obliged to point out that a policy of retaliatory discharge may be *per se* "willful" under *Thurston*.

658 F. Supp. at 927 n.5; *see Powell v. Rockwell International Corp.*, 788 F.2d 279, 286 & n.6 (5th Cir. 1986).

We affirm the district court. As noted above, this Circuit and the Supreme Court have long discredited the market force theory. Consequently, GM could not have had reasonable grounds to support a belief that its acts were in conformity with the law.[14]

V. *Expenses*

In addition to awarding damages to the appellees and awarding attorney fees to the appellees' counsel, the district court also awarded the appellees' counsel $34,979.44 in expenses, which the district court found "to have been reasonably expended under the circumstances for paralegals, law clerks, fee counsel, general office litigation expenses and expert witnesses." 658 F. Supp. at 932. GM challenges the district court's award of expenses, particularly $12,614 as fees for two expert witnesses.[15] As support for its position, GM relies on *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, —— U.S. ——, 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987), a case decided after the district court awarded expenses in the present case.

We begin our analysis with the language of 29 U.S.C.A. § 216(b), which provides in relevant part that "[t]he court in [an Equal Pay Act] action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." We note from the outset that this Court has never determined whether Sec-

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[14] We note that our conclusion in the context of the discussion on the statute of limitations issue that GM's actions met *Thurston*'s definition of "willful" precludes a finding of good faith on the part of GM. *See Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1561 (11th Cir. 1988) ("[U]nder the *Thurston* definition to find 'good faith' after a finding of 'willful' violation is illogical; the two terms are now mutually exclusive.").

[15] The district court awarded $8,120 for Dr. Paul Lees-Haley, who was deposed, but did not testify, and awarded $4,494 for Dr. William Farrar, who was deposed and did testify.

tion 216(b) permits an award of expenses for expert witness fees.[16]

An analogy, however, is possible. This Court permits an award of expert witness fees in civil rights cases. *Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir. Jan. 1981) (en banc), *cert. dismissed*, 453 U.S. 950, 102 S.Ct. 27, 69 L.Ed.2d 1033 (1981).[17] The en banc Court looked to congressional intent and determined that recovery for expert witness fees allowed citizens to recover what it costs them to vindicate civil rights in court. *Id.*[18] Similar policies underlie Section 216(b), thereby suggesting that the district court properly awarded expert witness fees to the appellees.

Our analysis, however, would not be complete without an examination of the *Crawford Fitting* decision. In that case, the Supreme Court held "that absent explicit statutory or contractual authorization for the taxation of the expenses of a litigant's witness as costs, federal courts are bound by the limitations set out in 28 U.S.C. § 1821

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[16] In *King v. McCord*, 621 F.2d 205 (5th Cir. 1980), the prevailing plaintiff sought attorney fees of $30,000 and costs for expert witnesses of $5,888.45. The district court awarded a lump-sum figure of $2,000 for attorney fees and costs. This Court's predecessor expressly noted that the "[a]ppellant filed this appeal on the basis of the alleged inadequate fee award only." *Id.* at 206. Consequently, the expert witness costs question was not addressed.

[17] The Fifth Circuit has overruled this aspect of the *Jones v. Diamond* opinion. *International Woodworkers of Am. v. Champion Int'l Corp.*, 790 F.2d 1174, 1175, 1180 (5th Cir. 1986) (en banc).

[18] The Court recognized that its holding contradicted the general rule that 28 U.S.C. § 1821 limits the expert witness fees award (currently a limit of $30 per day). This Circuit adheres to that general rule. *See Kivi v. Nationwide Mutual Ins. Co.*, 695 F.2d 1285, 1289 (11th Cir. 1983) ("[I]t is well settled that expert witness fees cannot be assessed in excess of witness fees provided in § 1821."); *see also Osterneck v. E.T. Barwick Industries*, 825 F.2d 1521, 1530 n.15 (11th Cir. 1987) (dicta).

and § 1920." *Id.* 107 S.Ct. at 2499.[19] Significantly, the Court broadly observed that

> [a]lthough Congress responded to our decision in *Alyeska* [*Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975)] by broadening the availability of attorney's fees in the federal courts, see . . . 42 U.S.C. § 1988, it has not otherwise "retracted, repealed, or modified the limitations on taxable fees contained in the 1853 statute and its successors." Thus, we are once again asked to hold that a specific congressional enactment on the shifting of litigation costs is of no moment. We think that, as in *Alyeska*, Congress has made its intent plain in its detailed treatment of witness fees. We will not lightly infer that Congress has repealed §§ 1920 and 1821, either through Rule 54(d) or *any other provision not referring explicitly to witness fees.*

Id. (citations omitted) (emphasis added).

The Supreme Court's broad statement suggests that the district court erred in awarding expert witness fees because Section 216(b) does not refer explicitly to them. *Cf.* The Equal Access to Justice Act, 28 U.S.C.A. § 2412 (d)(1)(A) ("[A] court shall award to a prevailing party other than the United States fees *and other expenses*, in addition to any costs awarded [as enumerated in 28 U.S.C.A. § 1920]. . . ." (emphasis added)); *see also International Woodworkers of America v. Champion International Corp.*, 790 F.2d 1174, 1179 & n.7 (5th Cir. 1986) (en banc) (collecting the "numerous statutes expressly allow[ing] federal courts to award the full amount of expert witness' fees as costs of litigation.").

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[19] Section 1920(3) provides that witness fees may be taxed as costs. Section 1821(b) provides that a "witness shall be paid an attendance fee of $30 per day for each day's attendance."

One basis for distinguishing *Crawford Fitting* from the present case has been suggested.[20] Because *Crawford Fitting* involved only the award of costs pursuant to Federal Rule of Civil Procedure 54(d),[21] that case did not necessarily determine whether expert witness fees could be awarded pursuant to a fee-shifting statute.[22] We hold that the broad language in *Crawford Fitting* does not permit a distinction based upon whether or not the award is made under a fee-shifting statute.[23] The

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[20] Three Supreme Court Justices noted that *Crawford Fitting* did not address whether a district court may award expert witness fees under Section 1988, an explicit fee-shifting statute. 107 S.Ct. at 2499 (Blackmun, J., concurring); *id.* at 2500 n.1 (Marshall, J., dissenting) (joined by Brennan, J.).

[21] Rule 54(d) provides in relevant part: "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs. . . ."

[22] The District Court of Massachusetts has seized on this distinction to award expert witness fees pursuant to Section 216(b). *Freeman v. Package Machinery Co.*, 1987 Westlaw 16456, at 13 (D. Mass. Sept. 2, 1987) ("Defendant's reliance on *Crawford* is misplaced because that opinion was inapplicable to cases involving explicit fee shifting statutes. . . ."). *But see Eivins v. Adventist Health System/Eastern & Middle America, Inc.*, 660 F. Supp. 1255, 1264 (D. Kan. 1987) (expert witness fees under § 216(b) limited to $30 per day); *cf. Furr v. AT & T Technologies, Inc.*, 824 F.2d 1537, 1550 (10th Cir. 1987) (Section 216(b) may permit expert witness fees as part of attorney fees, but parties stipulated to amount of attorney fees and court would not address issue; court implicitly held that expert witness fees could not be part of costs awarded).

[23] Post-*Crawford Fitting* cases examining the issue pursuant to Section 1988 or other civil rights fee-shifting provisions have not permitted awards for expert witness fees. *See Boring v. Kozakiewicz*, 833 F.2d 468, 474 (3d Cir. 1987) ("A prevailing party in a civil rights case is not entitled to tax [expert witness] fees as costs." (citing *Crawford Fitting*)); *Leroy v. City of Houston*, 831 F.2d 576, 584 (5th Cir. 1987) ("Although [*Crawford Fitting*] expressly considered whether [Rule] 54(d) could, in an antitrust case, override the statutory limit on witness fees, the Court's general

broad language in *Crawford Fitting* indicates that, although a statute may shift *attorney* fees, the statute does not operate to shift *witness* fees unless the statute refers explicitly to witness fees. In the present case, Section 216(b) does not refer explicitly to witness fees. In addition, nothing in the legislative history associated with Section 216(b)'s passage suggests that Congress intended the term "costs of the action" to differ from those costs as now enumerated in 28 U.S.C.A. § 1920. Consequently, we hold that the district court erred in awarding expert

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reasoning leaves us no room to construe the Voting Rights Act provision here otherwise. The Voting Rights Act does not specifically allow recovery of expert witness fees, and we must reverse this portion of the district court's award." (citation omitted)); *ECOS, Inc. v. Brinegar*, 671 F. Supp. 381, 404 n.12 (M.D.N.C. 1987) (*Crawford Fitting* persuasive authority for holding that $30 per day limit governs § 1988 award for expert witness fees); *Alberti v. Sheriff of Harris County*, —— F. Supp. ——, —— (S.D. Tex. Aug. 20, 1987) (same). *See also Catlett v. Missouri Highway & Transportation Commission*, 828 F.2d 1260, 1272 (8th Cir. 1987) (in light of *Crawford Fitting*, defendant in Section 1983 Title VII case "will be free [on remand] to challenge the assessment against it of the class" expert witness fees). *Cf. Mennor v. Fort Hood National Bank*, 829 F.2d 553, 557 (5th Cir. 1987) (in Title VII case, district court could award attorney's out-of-pocket costs because 28 U.S.C.A. § 1920 does not regulate those costs). *But see United States v. Yonkers Board of Education*, 118 F.R.D. 326, 330 (S.D.N.Y. 1987) (*Crawford Fitting* does not preclude award of expert witness fees). *But cf. Jones v. City of Chicago*, 1987 Westlaw 19800, at 8-9 (N.D. Ill. Nov. 10, 1987) ("[A]lthough the costs defendants object to are in large part no longer allowable under Section 1920, they are allowable as part of the reasonable attorney's fees obtainable by the plaintiff under Section 1988 [for out-of-pocket expenses incurred by the attorney in preparation of trial].").

We recognize that, in contrast to the language of Section 1988 and 42 U.S.C. § 2000e-5(k) (Title VII's fee-shifting provision), the language of Section 216(b) is mandatory, favors plaintiffs only, and separates attorney fees from costs. In light of *Crawford Fitting*'s broad language and the absence in Section 216(b)'s legislative history of congressional intent to compensate plaintiffs fully for expert witness fees as part of the costs of the action, we attach no significance to the difference in statutory language.

witness fees in excess of the amount permitted by 28 U.S.C.A. § 1821 and 28 U.S.C.A. § 1920. We thus remand this case to the district court so it may tailor the award of expert witness fees in accordance with this opinion. On remand, the district court also must ensure that only those items permitted to be taxed as costs are included in the award of expenses and that the amount of the award attributable to each of those items falls within the statutory limit as to that amount.

VI. *Conclusion*

In conclusion, we AFFIRM that the appellees established a prima facie case under the Equal Pay Act. We AFFIRM that GM failed to prove the pay disparity resulted from a "factor other than sex." We AFFIRM that the three-year statute of limitations applied. We AFFIRM that liquidated damages were appropriate. We REVERSE and REMAND as to expenses awarded.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

Civil Action No. CV-83-V-5777-NE

SHEILA ANN GLENN, *et al.*,
Plaintiffs,

versus

GENERAL MOTORS CORPORATION,
Defendant.

[Filed July 10, 1986]

OPINION AND ORDER

The factual and legal statements incorporated in this opinion constitute the court's findings of fact and conclusions of law required by Fed. R. Civ. P. 52(a). In this case plaintiffs, Sheila Ann Glenn ("Glenn"), Patricia J. Johns ("Johns"), and Robbie Nugent ("Nugent"), claim that the defendant, General Motors Corporation ("GM"), violated the Equal Pay Act, 29 U.S.C. § 206(d).[1]

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[1] 29 U.S.C. § 206(d)(1) provides:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made

The three plaintiffs are employed in the Materials Management Department (previously Tool Stores Department) of the Saginaw Division of GM in three different plants near Athens, Alabama. The plaintiffs currently work in the positions of Materials Management Expediter and Materials Follow-Up Clerk, previously designated Follow-Up and Associate Follow-Up Tool and Die respectively. A Follow-Up basically insures that adequate supplies of tools and operating materials are on hand in the GM plants to meet the minimum levels necessary to keep the plants running. A portion of the information used in the job is computer-generated. Normally, each plant has three Follow-Ups, but at times GM has used less than three. Up to the time of this suit, four women, including plaintiffs, have worked in the Follow-Up position—all other Follow-Ups have been men.

The Plaintiffs

Plaintiff Nugent was hired by GM *"off the street"* (from outside GM) in 1975 as a level 4 Associate Follow-Up Tool and Die, with salary of $600.00 per month. She was employed in Plant 21. Nugent was the first person hired by GM in a Follow-Up capacity. Nugent was told by GM that she was starting at the bottom of the salary scale but that in six months she would be evaluated on her ability. Nugent became a level 5 Follow-Up with no change in job duties during the second quarter of 1978 at a base monthly salary of $1,100.00. During 1984, her job title was changed to Materials Management Expediter. In 1985, her base monthly salary was $2,385.00. At

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pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

time of trial, her base monthly salary was $2,505.00, effective January 1986.

Plaintiff Glenn was hired "off the street" by GM in September 1977 as a salaried employee in Plant 21. Glenn was hired into a level 3 stenographer position with a base salary of $755.00 per month. In February 1981 Glenn transferred from the position of stenographer, at a base salary of $1,310.40, to the position of level 4 Associate Follow-Up Tool and Die in Plant 23. Glenn's base salary, after transfer, was $1,441.44 per month. In 1984, Glenn's job title was changed to Materials Follow-Up Clerk. In 1985 her base salary was $2,370.00 per month. At time of trial, her base monthly salary was $2,550.00, effective January 1986.

Plaintiff Johns was hired "off the street" by GM in October 1978 as a salaried employee in the position of secretary to the Plant 22 superintendent. In February 1981 Johns became a level 4 Associate Follow-Up Tool and Die in Plant 22 with a base monthly salary of $1,316.64. Johns currently holds the title of Materials Follow-Up Clerk, and her 1985 base salary was $2,271.00 per month. Her monthly salary at time of trial was $2,405.00, effective January 1986.

The Plaintiffs' Male Counterparts

In September 1975, Richard Tanley transferred from the hourly tool crib job at GM to the position of Associate Follow-Up Tool and Die alongside plaintiff Nugent in Plant 21, at a monthly base salary of $660.00. In April 1978 Tanley was given the level 6 position of supervisor, Tool Stores Department, Plant 22. In 1985 he was the Receiving and Inspection Supervisor. Tanley's job duties did not change when he was promoted from Associate Follow-Up to Follow-Up.

Stephen Downs was hired as an hourly employee at the Saginaw plant in January 1976. His job position was

skilled trades—70 Rate, however, he held the position of forklift driver. His base monthly equivalent salary was $932.35. Downs transferred from hourly to salaried employment, taking the position of Associate Follow-Up Tool and Die in February 1977. He worked in Plant 21 alongside Robbie Nugent. His monthly base salary was $975.00, which increased to $1,075.00 in April 1977. Nugent's monthly base salary for the same period was $878.94. In April 1978 Downs became a Follow-Up, with a base monthly salary of $1,250.00. His job duties did not change. Plaintiff Nugent's base monthly salary at that time was $1,100.00. In 1985 Downs' job title was changed to Materials Management Expediter. In May 1985 he took the position of Senior Materials Management Expediter, a level 6 position. His job duties did not change. In 1985 his monthly base salary was $2,775.00; Plaintiff Nugent's was $2,385.00.

Steven D. Greenlee was hired in April 1979 as an Associate Follow-Up Tool and Die for Plant 22. His monthly base salary was $1,175.00. Greenlee remained an Associate Follow-Up until he was laid off during June 1980. At the time of his layoff, his base monthly salary was $1,545.40. Greenlee was recalled during January 1981 to the same position he had previously held, at a base monthly salary of $1,545.54. During June 1981 Greenlee assumed a level 5 position of supervisor-in-training, and in September 1981 he became a production supervisor. In June 1985 Greenlee held the position of production supervisor.

Harold Wales was hired by GM during June 1977 at an hourly rate as a job setter—30 Rate. He received a monthly equivalent wage of $1,216.57. In May 1978 he transferred to the salaried position of Follow-Up Tool and Die alongside plaintiff Nugent in Plant 21 at a monthly base salary of $1,230.00. One month later he returned to an hourly position. In January 1981 Wales left his position of machine operator—20 Rate, with a

monthly equivalent wage of $1,608.22, and resumed the position of Follow-Up Tool and Die in Plant 21, with a monthly base salary of $1,608.22. Harold Wales currently holds the position of Materials Management Expediter. His job duties have not changed. In 1985 his base monthly salary was $2,485.00.

Robert Stephenson was hired by GM in March 1978 as an hourly employee, machine operator—20 Rate; however, in fact he was a crib attendant. His monthly equivalent pay was $1,171.51. Stephenson testified he applied for a salaried Tool Stores position but was hired as an hourly tool crib attendant. During September 1978 he transferred to the salaried position of Associate Follow-Up Tool and Die in Plant 22 at a monthly base salary of $1,220.00. Stephenson held this position until June 1980, at which time he returned to an hourly position as a tool crib attendant, and was paid $1,293.44 per month. He remained an hourly employee until January 1981, at which time he transferred to the position of Associate Follow-Up in Plant 22, with a base monthly salary of $1,564.00. Sometime between September 1982 and September 1983, Stephenson took the level 5 position of Follow-Up. In September 1984 his job title changed to Materials Management Expediter, fifth level. His base monthly salary increased from $1,752.96 to $1,875.66, but his job duties remained the same. GM admitted that Bobby Stephenson was transfered to the position of Associate Tool and Die Follow-Up in 1978 at GM's Plant 22 at a higher base salary than Robbie Nugent was being paid in Plant 21 at the time of Stephenson's transfer.

Billy White was hired by GM in December 1978 as an hourly employee. He held the position of machine operator—20 Rate, with a monthly equivalent pay of $1,608.22. In April 1981 he took the position of Associate Follow-Up Tool and Die in Plant 23, with a monthly base salary of $1,656.46. In 1984 his job title was changed from Associate Follow-Up to Materials Follow-Up Clerk, and dur-

ing May 1985, he was given a level 5 position as a Materials Management Expediter. White's job duties remained the same. His base salary in 1985 was $2,600.00. White was hired nearest in time to plaintiffs Glenn and Johns.

Jerry Pepper became an Associate Follow-Up in July 1981 at a monthly salary of $1,656.00. Jerry Pepper's job title was changed to Materials Follow-Up Clerk in 1984. In June 1985 Pepper became a level 5 Materials Management Expediter. Despite the change in job, Pepper's duties have remained the same. His 1985 base monthly salary was $2,740.00.

The Pay Disparity

Through 1985 all three plaintiffs earned less than all of their male counterparts in the Follow-Up position in the Tool Stores Department. In fact, the most highly-paid plaintiff made less through 1985 than the lowest-paid man. Plaintiff Nugent was hired as an Associate Follow-Up two months before Richard Tanley was hired in the same capacity, yet Tanley's monthly salary was $60 higher. Plaintiffs Johns and Glenn were hired as Associate Follow-Ups two months before Billy White, yet White's starting Associate Follow-Up salary was $215 per month higher than Glenn's and $336 per month higher than Johns'.

Plaintiffs Glenn, Johns and Nugent each received an "inequity adjustment" shortly after plaintiffs Johns and Glenn filed their EEOC charges. No one else in the Tool Stores Department received an "inequity adjustment." In determining whether to give an "inequity adjustment" to salary, the GM salaried personnel administration looks at the employee's salary in relation to a new hire's salary, the employee's performance and length of service. In August 1983 plaintiff Glenn received an "inequity adjustment" of $150.56. Defendant's stated reason for the adjustment was "due to review of salary structures of Tool Stores Department." In August 1983 plaintiff Johns

received an "inequity increase" in the amount of $142.82. The defendant's stated reason for the adjustment was "due to review of salary structure of Tool Stores Department." Plaintiff Nugent was the only employee in her department to get an inequity adjustment. The "inequity adjustment," made in August 1983, was in the amount of $159.74.

GM quibbles about whether the Follow-Up job handled by the three women plaintiffs and the men are comparable, and attempts to distinguish them on the basis of specific items handled by Follow-Ups. The function of the Tool Stores Department is generally to provide for all non-productive material that is used within the plants.[2] It involves the management of inventories and maintenance of the plants to keep the plants running. It also includes management of janitorial supplies. Specific functions include ordering non-productive material for the three Alabama plants, specifying order quantities, maintaining tooling crib stock levels, and making special or "emergency" buys. The positions held by plaintiffs and their male counterparts in October 1983 were "Follow-Up Tool and Die" and "Associate Follow-Up Tool and Die." These titles were changed in September 1984 to "Materials Management Expediter," "Materials Follow-Up Clerk," and "Senior Materials Management Expediter," although the job requirements and functions remained the same under all five of these titles. Except for six months in 1983 when all Tool Stores Departments for

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[2] "Non-productive" materials are materials required to operate the plant and maintain machinery to build the parts for a GM automobile. Such materials include, but are not limited to: bearings; chains; seals; power transmission parts (such as sprockets, couplings, reducers and gear boxes); electrical parts; blueprint tooling; stationery items (such as paper, forms, tags, pencils); spare parts; cutting tools; hand tools; tool holders; abrasives; grinding wheels; maintenance and tool steel oils; chemicals; lubricants; nuts, bolts, and screws; charts; springs; janitorial supplies and other miscellaneous supplies.

the three plants were consolidated, each plant has had a separate Tool Stores Department. A Follow-Up and Associate Follow-Up in Tool Stores orders and disburses non-productive materials, confirms orders, processes emergency orders, and processes daily paper work. They set up new items of inventory, and they deal with outside salesmen.

GM contends that the male Follow-Ups who handle items ordered from blueprints need different skills than those Follow-Ups, including the plaintiffs, who do not. The court finds that for all purposes material to this case the positions of Blueprint Follow-Up and Follow-Up are identical. The court notes that GM has never treated Follows-Ups differently for compensation purposes on the basis of items handled. When plaintiff Nugent handled blueprint items, for example, she still made less than a male Follow-Up who did not. Some of the men handling blueprint items currently make less money than other men who do not work with blueprint items. The only current Follow-Up who has had college training in working with blueprints is plaintiff Johns, and she does not handle blueprint items at present.

The court does not doubt that increased familiarity with blueprint items may enable the Follow-Ups who handle them to work with them in a more meaningful way, but GM does not require formal blueprint training. The court does not credit any evidence presented by GM indicating that Blueprint Follow-Ups actually interpret blueprints. GM has skilled "troubleshooters" and engineers present to carry on this function, and the court finds it highly unlikely that GM would rely on unskilled Follow-Ups to interpret blueprints to its suppliers when the continued viability of the plants is at stake. The Blueprint Follow-Ups provide the vendors with only routine information that can be obtained from the blueprints without actually interpreting them.

GM attempts to justify the pay disparity between the male and female Follow-Ups by emphasizing the route by which each Follow-Up progressed by the Follow-Up position. GM contends that the male Follow-Ups transferred into their positions from higher-paid hourly jobs within GM, and that GM maintained this higher level of pay to encourage them to make the move to a salaried Follow-Up position. The higher hourly salaries were the result of collective bargaining which did not affect the salaried positions. The women plaintiffs, GM argues, came from lower-paid *salaried* positions within GM. GM asserts that their salary policies are gender-neutral, and are uniformly applied in determining entry salaries for Follow-Ups.

GM's asserted policy to encourage employees to transfer from hourly positions to salaried positions by maintaining the same rate of pay after transfer is not in writing. GM maintains a written salaried administration plan or manual, commonly referred to as the "black book," which contains no mention of the "transfer policy." GM also maintains a written merit plan, to determine certain pay increases, which contains no reference to the "transfer policy."

The court finds that this so-called salary "policy" is in fact not a policy at all, but merely one aspect of a practice. In practice GM simply pays Follow-Ups what it takes to induce them to accept the employment. The court notes that historically companies may and do hire women at lower starting salaries. The court is thus unconvinced of GM's attempted justification for the pay disparity. The three female plaintiffs are being paid less money than their male counterparts for equal work without justification.

In order for plaintiffs to establish a prima facie case under the Equal Pay Act, they must show "that an employer pays different wages to employees of opposite sexes

'for equal work on jobs the performance of which requires equal skills, effort, and responsibility, and which are performed under similar working conditions.'" *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974); *Morgado v. Birmingham-Jefferson County Civil Defense Corps*, 706 F.2d 1184, 1187-88 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 715 (1984). The Equal Pay Act "also establishes four exceptions—three specific and one a general catchall provision—where different payment to employees of opposite sexes 'is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.'" *Corning*, 417 U.S. at 196. The court is convinced that plaintiffs have carried their burden of establishing a prima facie case of liability under the Equal Pay Act, and that the defendant GM has failed to establish any of the Act's four exceptions justifying a pay disparity.[3]

On the issue of damages, the court must determine the applicable statute of limitations for this Equal Pay Act action. 29 U.S.C. § 255(a) provides that such actions "may be commenced within *two years* after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a *willful violation* may be commenced within *three years* after the cause of action accrued." The court in *Brock v. Georgia Southwestern College*, 765 F.2d 1026 (11th Cir. 1985), provided these guidelines for determining when a "willful" violation has occurred ne-

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[3] Plaintiffs also alleged a claim of retaliation against GM. Plaintiffs contended at trial that various actions taken by GM constituted improper acts in retaliation for plaintiffs having brought this suit. The court finds a paucity of evidence to support a claim of retaliation and therefore denies the claim.

cessitating the application of the three-year statute of limitations:

> [A] violation is willful if the employer knows or has reason to know that his or her conduct is governed by the [Equal Pay] Act. *Brennan v. Heard*, 491 F.2d 1 (5th Cir. 1974). An employer need not proceed with knowledge that his or her actions are contrary to the Act in order for willfulness to be found. *Id.* An action is "willful" if the employer knew that the Act was "in the picture" regardless of the defendant's good faith. *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir. 1971), *cert. denied*, 409 U.S. 948, 93 S. Ct. 292, 34 L. Ed.2d 219 (1972). *See also Marshall v. A & M Consolidated Independent School District*, 605 F.2d 186, 190-91 (5th Cir. 1979) (actual awareness of the law is unnecessary to establish willfulness; knowledge is imputed).

Brock, 765 F.2d at 1039.[4] Clearly, in this case GM knew

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[4] The court notes that the Supreme Court's decision in *Trans World Airlines, Inc. v. Thurston*, 105 S. Ct. 613 (1985), is inapposite. In *TWA* the Court defined a violation of the Age Discrimination in Employment Act as "willful" if "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *TWA*, 105 S. Ct. at 625. *TWA*, however, concerned the award of *liquidated damages*, not the determination of the applicable statute of limitations. The Court noted: "Even if the 'in the picture' standard were appropriate for the statute of limitations, the same standard should not govern a provision dealing with liquidated damages." *Id.* The Court emphasized the distinction between defining the term "willful" in the context of the liquidated damages provision of the ADEA, and defining "willful" in terms of 29 U.S.C. § 255(a) concerning the applicable statute of limitations in Equal Pay Act cases. This circuit in a post-*TWA* decision has clearly adhered to the "in the picture" definition of "willful" in the Equal Pay Act statute of limitations context, and the court's application of this standard is therefore not affected by the *TWA* decision. *See Brock*, 765 F.2d at 1039.

more than that the Equal Pay Act was merely "in the picture." GM was aware at all times material to this litigation that the Equal Pay Act governed their conduct concerning plaintiffs. In fact GM has admitted that it knew about the Equal Pay Act three years prior to the date of the filing of plaintiffs' lawsuit (October 1983). The court will therefore apply a three-year statute of limitations in determining the damage award for plaintiffs.

Plaintiffs further contend that they are entitled to liquidated damages pursuant to 29 U.S.C. § 216(b) which provides as follows:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.

29 U.S.C. § 216. Section 260, however, provides that "if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages . . . ." 29 U.S.C. § 260. For this court to exercise its discretion, GM "must show that [its] failure was both in good faith and predicated upon such reasonable grounds that it would be unfair to impose liquidated damages upon [it]." *Hays v. Republic Steel Corp.*, 531 F.2d 1307, 1309 n.3 (5th Cir. 1976). This court is convinced that GM's violation of the Equal Pay Act, while "willful" as that term is defined by this circuit in this context, was in good faith and predicated upon reasonable grounds. As stated in *Brock*, an act may be " 'willful' if the employer knew that the [Equal Pay] Act was 'in the picture' regardless of the defendant's good faith."

Brock, 765 F.2d at 1039. GM knew that their conduct was governed by the Equal Pay Act, but created the pay disparity concerning plaintiffs in good faith believing the disparity justified on the basis of their hourly transfer pay "policy." The court, therefore, will not award liquidated damages.

Because the parties have not fully presented their respective contentions concerning the computation of damages, the court directs the plaintiffs to submit a memorandum within twenty days from this date addressing in itemized detail the precise method of computation of plaintiffs' damages and presenting their authority for the award of prejudgment interest. Defendant shall thereafter have fifteen days for the filing of a countermemorandum. The parties should be mindful of the court's ruling that liquidated damages will not be awarded and that the three-year statute of limitations applies. The issue of the award of attorney's fees previously was reserved in this case for future consideration, and the court further directs that within twenty days following the date of this opinion plaintiffs shall submit their application for attorney's fees with supporting memorandum. If defendant desires to respond to plaintiffs' attorney's fees memorandum it may do so within fifteen days following the filing of plaintiffs' application and memorandum. The court admonishes both parties that they should attempt to reach an agreement on both damages and attorney's fees and should promptly communicate such agreement to the court. If no agreement is reached by the expiration of the time allowed above for the filing of defendant's fees response, the court will set a hearing to consider the computation of damages and attorney's fees.

DONE and ORDERED this 10th day of July, 1986.

/s/ Robert S. Vance
United States Circuit Judge
Sitting by Designation

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

Civil Action No. CV83-V-577NE

SHEILA ANN GLENN, PATRICIA F. JOHNS
and ROBBIE NUGENT,
Plaintiffs,

versus

GENERAL MOTORS CORPORATION,
Defendant.

JUDGMENT

In consideration of the findings of fact and conclusions of law contained in this court's Opinion and Order entered July 10, 1986 and in the Memorandum of Decision filed contemporaneously herewith, it is by the court

ORDERED, ADJUDGED and DECREED that plaintiffs have and recover of defendant the amounts indicated by their respective names as follows:

Sheila Ann Glenn: Twenty-four thousand nine hundred ninety-eight and 91/100 dollars ($24,998.91).

Patricia F. Johns: Thirty-four thousand five hundred thirty-four and 33/100 dollars ($34,534.33).

Robbie Nugent: Forty-three thousand seven hundred ninety-four and 57/100 dollars ($43,794.57).

It is further ORDERED, ADJUDGED and DECREED that Bell, Richardson, Herrington, Sparkman and Shepard, P.A. be and is hereby awarded one hundred thirty-

two thousand dollars ($132,000.00) in fees and thirty-four thousand nine hundred seventy-nine and 44/100 dollars ($34,979.44) in expenses for their services in representing the plaintiffs and accordingly that said attorneys have and recover of defendant one hundred sixty-six thousand nine hundred seventy nine and 44/100 dollars ($166,979.44); and that costs of court are taxed against defendant.

DONE and ORDERED this 4th day of February, 1987.

/s/ Robert S. Vance
United States Circuit Judge
Sitting by Designation

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

Civil Action No. CV83-V-577NE

SHEILA ANN GLENN, PATRICIA F. JOHNS
and ROBBIE NUGENT,
Plaintiffs,

vs.

GENERAL MOTORS CORPORATION,
Defendant.

MEMORANDUM OF DECISION

After entering the Opinion and Order dated July 10, 1986, the court received a verified motion for attorney's fees, as well as memoranda from the respective parties concerning the computation of damages and the award of attorneys' fees. On December 2, 1986, the court held an evidentiary hearing and received further oral argument. As that time, the parties submitted exhibits, affidavits, and oral testimony. Thereafter, post hearing memoranda were submitted. The court has now fully considered these matters and enters the following Memorandum of Decision, which incorporates the findings of fact and conclusions of law required by Fed. R. Civ. P. 52(a). Except as modified herein, the Opinion and Order of July 10 remains in full effect.

I. DAMAGES ISSUES

1. *Statute of Limitations*—The first issue confronting the court is the construction of the word "willful" in the statute of limitations section of the Portal-to-Portal Act,

29 U.S.C. section 255 (a). A "willful" violation of the Equal Pay Act, 29 U.S.C. § 206 (d), adds one year to the statute of limitations, significantly increasing General Motors' liability. In *Brock v. Georgia Southwestern College*, 765 F.2d 1026 (11th Cir. 1985), the Eleventh Circuit reaffirmed its commitment to the "in the picture" standard, which was pioneered in *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir. 1971), *cert. denied*, 409 U.S. 948 (1972). Under this standard, a violation is "willful" if the employer knows or has reason to know that the Equal Pay Act governs its conduct. When the employer knows that the Equal Pay Act is "in the picture," its violation is "willful" regardless of the employer's good faith. *Brock v. Georgia Southwestern College*, 765 F.2d at 1039. General Motors has admitted that it knew that the Equal Pay Act governed its conduct. For three years prior to the time the plaintiffs filed this lawsuit, the plaintiffs continually protested General Motors' violation of their rights.

General Motors argues that the "in the picture" standard is no longer viable. Specifically, General Motors points to *Transworld Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), in which the Supreme Court elaborated a different construction of the word "willfulness."[1] Both the

[1] In fact, *Thurston*, addresses the construction of the word "willfulness" in a completely different context—an age discrimination action—where section 7(b) of the ADEA permits liquidated damages "only in cases of willful violations." 29 U.S.C. § 626(b). Although *Thurston*, rejected the *Jiffy June* "in the picture" analysis for liquidated damages under the ADEA, the Supreme Court expressly noted that the *Jiffy June* standard might be appropriate for statute of limitations questions. 105 S.Ct. at 625; *see also E.E.O.C. v. McCarthy*, 768 F.2d 1, 5 (1st Cir. 1985). Differentiating between these two settings is consistent with the different purposes served by the ADEA's liquidated damages provision and a statute of limitations. Congress intended the liquidated damages provision of the ADEA to serve the same punitive purpose as § 16(a) of the FLSA, which imposes a criminal penalty for "willful" violations. It is not surprising that the Supreme Court relied upon cases inter-

Third and Seventh Circuits have held that "willful" means the same thing throughout the Age Discrimination in Employment Act (ADEA) and Fair Labor Standards Act (FLSA). *See, e.g., Brock v. Richland Shoe Co.*, 799 F.2d 80, 82-83 (3rd Cir. 1986); *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 308-312 (7th Cir. 1986).[2] Under this view, *Thurston* supplies a uniform definition of "willful" for both statutes: "a violation is willful if the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." 105 S. Ct. at 625.

The *Thurston* reckless disregard standard requires an employer to make a "reasonable effort to determine whether the plan he is following would constitute a violation of the law." 105 S. Ct. at 624 (quoting *Nabob Oil Co. v. United States*, 190 F.2d 478, 479 (10th Cir. 1950), *cert. denied*, 342 U.S. 876 (1951)).[3] In *Thurston*, TWA

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preting the FLSA criminal penalty provision in order to fashion a similar standard for applying section 7(b), its ADEA counterpart. *See Thurston*, 105 S.Ct. at 624. In contrast, a statute of limitations is not punitive but restitutionary: it extends the period for the recovery of back wages wrongfully withheld. *See Secretary of Labor v. Daylight Dairy Products, Inc.*, 779 F.2d 784, 789 (1st Cir. 1985); *Donovan v. Bel-loc Diner, Inc.*, 780 F.2d 1113, 1117 (4th Cir. 1985). This court does not believe that the Supreme Court's interpretation of one statute can be authority for the interpretation of another so strikingly different in purpose. In the absence of such authority, this court is bound by Eleventh Circuit precedent.

[2] Apparently a majority of other jurisdictions continue to apply the "in the picture" standard. *See, e.g., Nolting v. Yellow Freight System, Inc.*, 799 F.2d 1192 (8th Cir. 1986); *Crenshaw v. Quarles Drilling Corp.*, 798 F.2d 1345, 1349-50 (10th Cir. 1986); *Secretary of Labor v. Daylight Products, Inc.*, 779 F.2d 784 (1st Cir. 1985); *Donovan v. Bel-loc Diner, Inc.*, 780 F.2d 1113 (4th Cir. 1985); *Soler v. G. & U, Inc.*, 628 F. Supp. 720, 723-24 & n.3 (S.D.N.Y. 1986); *Brock v. El Paso Natural Gas Co.*, 644 F. Supp. 1202, 1208-09 (W.D. Tex. 1986).

[3] If an employer could escape the "reckless disregard" standard solely by obtaining a green light from its lawyers, it would be far

complied with this duty by seeking legal advice and consulting with the Union in an effort to conform its retirement policy to the ADEA. 105 S.Ct. at 625. In contrast, General Motors chose to ignore clear signs that its practices were illegal.[4] A violation rises to the level of reck-

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too easy for a defendant to circumvent the requirements of the Act. *Cf. Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139, 1141-42 (5th Cir. 1972). It seems that the better law would require, at a minimum, good faith reliance on a colorable legal position. *See, e.g., Whitfield v. City of Knoxville*, 756 F.2d 455, 463-64 (6th Cir. 1985) (violation not willful where case law unsettled and defendants rely upon a minority district court opinion); *E.E.O.C. v. Westinghouse Electric Corp.*, 646 F. Supp. 555, 563 (D.N.J. 1986) (violation not willful when the United States government maintains policies similar to those of the defendants); *cf. Thurston*, 105 S.Ct. at 620 (summary judgment by district court in favor of defendants). Unfortunately, the case law interpreting "willfulness" under the *Thurston* definition defies any overarching legal analysis. *Compare Dreyer v. ARCO Chemical Co.*, 801 F.2d 651, 657-58 (3rd Cir. 1986) (willful conduct involves element of outrage); *Berndt v. Kaiser Aluminum & Chemical Sales, Inc.*, 604 F. Supp. 962, 967 (E.D. Pa. 1985) (no "willfulness" where management reviews discharges implicating the ADEA) *to Guthrie v. J.C. Penney Co., Inc.*, 803 F.2d 202, 209 (5th Cir. 1986) (evidence of undue pressure on plaintiff and early retirement policy supports a finding of willfulness); *Galvan v. Bexar County*, 785 F.2d 1298, 1307 (5th Cir. 1986) *reh'g denied* 790 F.2d 890 (1986) (age discrimination willful where age was the explicit reason for not rehiring employee); *E.E.O.C. v. Great Atlantic and Pacific Tea Co.*, 618 F. Supp. 115, 118 (D.C. Ohio 1985) (ADEA violation willful when denial of severance pay was "deliberate, voluntary, and intentional."); *Slenkamp v. Borough of Brentwood*, 603 F. Supp. 1298, 1302 (W.D. Pa. 1985) (material issue as to recklessness where employer posted no signs informing employees of their rights under the ADEA); *Elbe v. Wausau Hospital Center*, 606 F. Supp. 1491, 1499 (W.D. Wisc. 1985) (conduct willful when there is a conscious decision to terminate plaintiff).

[4] General Motors asserts that its officials acted pursuant to a "transfer pay policy." *Compare Thurston*, 105 S. Ct. 613 (1985) (good faith implementation of a facially neutral employment policy). This court has found, however, that the company never adopted such a policy. What General Motors characterizes as a

less disregard when an employer has the resources to conform its conduct to the law, but declines to make the effort.[5] *See, e.g., E.E.O.C. v. Westinghouse Electric Corp.*, 632 F. Supp. 343, 372 (E.D.Pa. 1986); *Slider v. National Rollings Mills, Inc.*, No. 83-5929, slip op. (E.D.Pa. June 9, 1986); *Gorman v. Continental Can Co.*, No. 76-C-908, slip op. (N.D. Ill. March 25, 1986); *Jennings v. Lenox Hill Hospital*, No. 84-1081, slip op. (S.D.N.Y. January 22, 1986). This court finds that General Motors' conduct falls within both the *Thurston* and *Jiffy June* definitions of willfulness.

2. *Computation of Damages*—Both parties have submitted computations of the sums required to compensate the plaintiffs in accordance with the findings and conclusions expressed in the July 10 Opinion and Order. These figures are close and the parties have stipulated that they would "split the difference." The court therefore finds that the plaintiffs were undercompensated during the period beginning three years prior to the filing of suit and ending on the date of trial in the following amounts:

Sheila Ann Glenn	$12,499.46
Patricia F. Johns	$17,267.17
Robbie Nugent	$21,897.29

3. *Prejudgment Interest*—Whether or not liquidated damages are awarded, binding precedent in this circuit precludes the award of prejudgment interest. *See Bar-*

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corporate policy was not a policy at all, but the practice of individual decisionmakers.

[5] As an explanation for its conduct during settlement negotiations, General Motors has brought to this court's attention its policy of obtaining the resignation of employees who file discrimination claims as a condition precedent to settlement. This court feels obliged to point out that a policy of retaliatory discharge may be *per se* "willful" under *Thurston*. *See Powell v. Rockwell International Corp.*, 788 F.2d 279, 286 & n.6 (5th Cir. 1986).

cellona v. Tiffany English Pub, 597 F.2d 464, 469 (5th Cir. 1979); *Foremost Dairies, Inc. v. Ivey*, 204 F.2d 186 (5th Cir. 1953). Liquidated damages, if allowed, act as compensation for delay in the payment of sums due under the Act. *Id.* at 190.

4. *Liquidated Damages*—The court finds that individual company officials held a good faith belief that General Motors had adopted a "transfer pay policy." In the July 10, 1986 Opinion and Order, the court concluded that such a finding was sufficient to establish a good faith defense, making an award of liquidated damages discretionary under 29 U.S.C. § 260. A further review of the case law in this circuit, however, has convinced the court that it applied the incorrect legal standard in reaching this result.

The purpose of a liquidated damages award is to encourage employers to make a good faith effort to ascertain and comply with the law. *Archambault v. United Computing Systems, Inc.*, 786 F.2d 1507, 1514 (11th Cir. 1986). Accordingly, "good faith requires some duty to investigate potential liability under the FLSA."[6] *Washington v. Miller*, 721 F.2d 797, 804 (11th Cir. 1983); *Barcellona v. Tiffany English Pub, Inc.*, 597 F.2d 464, 468-69 (11th Cir. 1979). The Eleventh Circuit has taken a strict view: the good faith defense applies only when an employer innocently and to his detriment follows the law "as it was laid down to him by government agencies, without notice that such interpretations were claimed to be erroneous or invalid." *Olson v. Superior Pontiac-GMC, Inc.*, 765 F.2d 1570, 1579 (11th Cir.) *modified on other grounds*, 776 F.2d 265 (1985). *Accord E.E.O.C. v. Home Insurance Co.*, 672 F.2d 252, 263 (2d Cir. 1982); *Clifton D. Mayhew, Inc. v. Wirtz*, 413 F.2d 658, 661 (4th Cir. 1969).

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[6] In *Thurston*, the Supreme Court fashioned its definition of "willfulness" to reflect these same concerns. 105 S. Ct. at 625 n.22.

General Motors argues that an employer sustains its burden of proof under section 260 by demonstrating a reasonable, albeit mistaken, belief that it was not violating the act. *See, e.g., Walton v. United Consumers Club, Inc.*, 786 F.2d 303; 312 (7th Cir. 1986); *Claymore v. Far-Mar-Co.*, 709 F.2d 499, 505 (8th Cir. 1983); *Martinez v. Food City, Inc.*, 658 F.2d 369, 376 (5th Cir. Unit A 1981). Even under this less exacting standard, ignorance cannot form the basis for a reasonable belief.[7] *See, e.g., Doty v. Elias*, 733 F.2d 720, 726 (10th Cir. 1984); *Marshall v. Brunner*, 668 F.2d 748, 753 (3rd Cir. 1982); *Brock v. El Paso Natural Gas Co.*, 644 F. Supp. 1202, 1209 (W.D.Tex. 1986). There is no credible evidence that General Motors made any attempt to investigate its responsibilities. *See Sinclair v. Automobile Club of Oklahoma, Inc.*, 733 F.2d 726, 730 (10th Cir. 1984); *Melanson v. Rantoul*, 536 F. Supp. 271, 293 (D.R.I. 1982). General Motors has adduced neither case law nor administrative rulings to demonstrate that there were reasonable grounds to support a belief that its acts were in conformity with the law.[8] "A good heart but an empty head does not produce a defense." *Walton v. United Consumers Club, Inc.*, 786 F.2d at 312. The court concludes that it has no choice but to award liquidated damages.

II. ATTORNEY FEES AGAINST GENERAL MOTORS

The court has given detailed consideration to the twelve factors set forth in *Johnson v. Georgia Highway Express*, 488 F.2d 714, 717-719 (5th Cir. 1974). A more useful starting point for determining a reasonable attorney fee

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[7] A reasonable belief also cannot be based on a simple misunderstanding of the requirements of the Act. *Crenshaw v. Quarles Drilling Corp.*, 798 F.2d at 1351.

[8] General Motors has cited decisions which advance the hardly earthshaking proposition that a corporate policy can be lawful if based on a factor other than sex. In fact, General Motors could not have relied upon these cases because there was no transfer policy.

under more recent law, however, seems to be the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Pennsylvania v. Delaware County Citizens' Council For Clear Air*, 106 S. Ct. 3088, 3097 (1986); *Hensley v. Eckerhardt*, 461 U.S. 424, 433 (1983). The Supreme Court appears to recognize a strong presumption that the lodestar figure—the product of reasonable hours times a reasonable rate—represents a reasonable fee. *Delaware County Citizens' Council For Clean Air*, 106 S. Ct. at 3097; *Blum v. Stenson*, 465 U.S. 886, 897 (1984). This calculation may subsume many of the twelve factors set out in *Johnson v. Georgia Highway Express*, 488 F.2d 714, 717-19 (5th Cir. 1974). *See Delaware County Citizens' Council For Clean Air*, 106 S. Ct. at 3098; *Blum*, 465 U.S. at 896-900; *Hensley*, 461 U.S. at 434 n.9; *Jones v. Central Soya Co.*, 748 F.2d 586, 589 (11th Cir. 1984); *United States v. Cert. Real Prop. Loc. at 4880 S.E. Dixie Highway*, 628 F. Supp. 1467, 1472 (S.D. Fla. 1986).

1. *Reasonable Hours*

The court must exclude from its initial fee calculation hours that are not "reasonably expended." *Hensley*, 103 S. Ct. at 1939 (citing S. Rep. No. 94-1011, p.6 (1976)). Plaintiffs' attorneys seek compensation for a total of 1889.1 attorney hours and 411 paralegal and law clerk hours. The reasonableness of this time and labor has been assessed in light of two other *Johnson* factors—the novelty and difficulty of the case and the result. *See Erkins v. Bryan*, 785 F.2d 1538, 1545 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 455 (1986); *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1137 (11th Cir. 1984) *York v. Alabama State Board of Education*, 631 F. Supp. 78, 83 (M.D. Ala. 1986).

This case was a routine disparate treatment case, although it may not have been the type of case plaintiffs' counsel ordinarily encounters. Such novel issues as there

were did not present significant legal and factual hurdles. On the other hand, the court notes that plaintiffs' counsel obtained substantial benefits for their clients. When only the interests of the named plaintiffs are at stake, plaintiffs' attorneys should have in mind the actual amount in controversy, and this court would normally balk at awarding fees substantially in excess of that amount. *See Jones v. Central Soya Co., Inc.*, 748 F.2d 586, 591 (11th Cir. 1984). In the present case, however, the plaintiffs' recovery may benefit other female employees who have been adversely affected by General Motors' discriminatory practices. *See City of Riverside v. Rivera*, 106 S. Ct. 2686, 2694, 2700 (1986) (Brennan plurality) (Powell concurrence) (rejecting argument that "fee awards under section 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers").[9]

Notwithstanding possible benefit to other female employees, the number of hours for which plaintiffs claim compensation is clearly unreasonable. The court has no doubt that plaintiffs' attorneys worked more hours than they actually claim. The actual figure exceeds 2300 hours. Even defendant's counsel has billed for substantially over a thousand hours. In contrast, defendant's expert witness, James P. Alexander, testified that the maximum amount of time that is reasonable for litigating this type of case would be approximately 625 hours.

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[9] The plaintiffs were successful in all significant issues except their harassment claim. This claim was relatively insignificant and involved discrete issues of fact and law. *Compare City of Riverside*, 106 S. Ct. at 2692; *Hensley*, 461 U.S. at 435. "A fee applicant should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims." *City of Riverside*, 106 S. Ct. at 2692; *Hensley*, 103 S. Ct. at 1941. Plaintiffs' records do not lend themselves to a determination of the time devoted to this losing issue. Nevertheless, the court credits Mr. Richardson's testimony that his firm spent no more than 40 hours pursuing this harassment claim.

Under ordinary circumstances, the court would consider 625 hours as an absolute maximum, even if the case were hard-fought and vigorously contested.

Several factors contributed to this staggering waste of legal resources. First, plaintiffs' counsel simply over-prepared, using three lawyers where one would suffice and expending twice the time on memoranda and briefs as was reasonably necessary. *See Jones v. Central Soya Company, Inc.*, 748 F.2d 586, 594 (11th Cir. 1984). Counsel for the prevailing party must make a good-faith effort to exclude such excessive and redundant hours from a fee request just as a lawyer in private practice is ethically obligated to exclude such hours from his fee submission. *See Hensley*, 103 S. Ct. at 1939-40; *Erkins v. Bryan*, 785 F.2d 1538, 1545 (11th Cir. 1986). More significantly, the relations between opposing attorneys in this case often degenerated into an acrimonious bickering context which proved to be enormously time-consuming.

General Motors' defense techniques also occasioned a great deal of extra work. General Motors has been stubbornly litigious and has adopted an obstructionist policy in responding to discovery. If General Motors had made a straightforward presentation of its claimed defense and willingly disgorged the information sought by the plaintiffs, this case should have consumed no more than the 625 hours to which reference has been made. At every step of the way, however, General Motors has fully participated in the quibbing that has become the hallmark of this case. Two additional actions by General Motors are relevant.

First, General Motors now states that its standard practice is not to settle any discrimination case unless the complaining employee resigns. This position, the apparently nonnegotiable character of which was only recently revealed to the court, made settlement all but

impossible. Nevertheless, General Motors continued to assure the court of its interest in negotiations and the court continued to pressure both sides to reach a settlement. Plaintiffs' counsel, who had been told that plaintiffs' resignation was essential to settlement, responded by embarking upon an expensive, time-consuming evaluation of the economic loss that plaintiffs would suffer as a consequence of resigning. The court finds that, under the circumstances, these undertakings were reasonable and necessary.

General Motors also injected needless work and expense into this case by adopting an "afterthought" defense. Specifically, General Motors contended that the plaintiffs were not entitled to as much compensation as certain male employees because these male employees utilized an additional skill, namely, working with blue prints. This clearly had no causal relationship with General Motors' discrimination against the plaintiffs. Although this contention was lacking in factual merit, it demanded a response. Plaintiffs' rebuttal required substantial discovery and expensive expert assistance. A defendant has the right to put on its case as it sees fit. This court does not criticize General Motors for exercising this right and its disposition is in no respect punitive.[10] General Motors, however, cannot complain of the waste of time

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[10] At the conclusion of the evidence the court solicited post-hearing memoranda. At that time, it stated its tentative, non-binding, impressions. Defendant takes strenuous exception to certain of the court's remarks. These comments were deliberately couched in provocative terms in a successful effort to elicit pointed memoranda. Counsel has made an unfortunate misconstruction of those remarks, however, if they were perceived as reflecting any punitive disposition by the court. The misunderstood point is simply that defendants' own actions, in the two particulars discussed above, justified and indeed necessitated the expenditure of a great deal more time and money by plaintiffs' counsel than would otherwise have been reasonable. This substantial expense must be borne by defendant.

and resources precipitated by its own strategy. *See Hudson v. Deyton*, 770 F.2d 1558, 1575 (11th Cir. 1985), *reh'g denied*, 777 F.2d 704 (1985).

After considering all these facts and circumstances, the court concludes that 1200 hours was a reasonable expenditure of time by plaintiffs' counsel through the time of trial and to the present date. In disallowing a substantial portion of the hours expended, the court is aware of the desirability of making specific determinations with respect to each disallowed time segment. Unfortunately that is not possible in this case. The only specific item that can be so treated is the 40 hours spent on preparing the unsuccessful harassment claim. The remainder of the disallowance falls into a general category of counsel's simply exceeding the maximum number of hours that could ever be reasonable in this situation. The evidence supporting the fee application does not provide information necessary to a specific breakdown of such items as unnecessary preparation, uses of excessive personnel, and time spent in needless bickering. Nevertheless, the court is reasonably satisfied that, of the total hours expended, 1200, but no more than 1200, were reasonable under the attendant circumstances.

Plaintiffs' fee application also seeks payment for 411 hours worked by paralegals and law clerks. Some of these hours were actually attorney hours that counsel voluntarily downgraded in the application. The court finds that this number is also excessive and will limit this expense to compensation for 200 hours. This will reduce plaintiffs' reimburseable expenses by $7385.00

2. *Prevailing Market Rate*

In determining the prevailing market rate, the court has considered the following *Johnson* factors: customary fee awards in similar cases; skill required to perform the legal services properly; the experience, reputation and ability of the attorneys; the contingent nature of

the fee; undesirability of the case; time limitations; preclusion of other employment; and the nature and length of professional relationship with the clients. *See York v. Alabama State Board of Education*, 631 F. Supp. 78, 84 (M.D. Ala. 1986).

In this district, awards in employment discrimination cases taken on a contingency fee basis range from $90 to $150 per hour. This approximates the customary fee for similar work in this community, which ranges from $90 to $125 per hour. This case required the skill of a competent trial attorney experienced in federal litigation. The firm of Bell, Richardson, Herrington, Sparkman, and Shepard is one of the oldest and best known firms in North Alabama. Insurance companies, railroads and large corporations form the bulk of the firm's clients.[11] As a result, most of the members of the firm lack experience litigating discrimination cases for a plaintiff. Nevertheless, plaintiffs' counsel displayed extraordinary skill and fully anticipated every development at trial.[12] This case would be considered an undesirable one for the Richardson firm: corporate clients do not applaud lawyers who represent employees in discrimina-

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[11] This court is satisfied that the number of hours plaintiffs' counsel reasonably devoted to this case is at least equal to the time expended by the defense counsel. The defendants have not argued that their representation was more involved than the representation of plaintiffs. *See Hudson v. Deyton*, 770 F.2d 1558, 1574 (11th Cir. 1985), *reh'g denied*, 777 F.2d 704 (1985); *Naismith v. Professional Golfers Association*, 85 F.R.D. 552, 563 (1979).

[12] The senior partner, Patrick W. Richardson, one of the attorneys in this case, is a past president of the state bar association and a distinguished leader among the bar of this court. John A. Wilmer, who also worked on this case, practices almost exclusively in the labor field and has had several years experience representing management. James H. Richardson, who acted as lead counsel, routinely handles important matters for his firm. Mr. Richardson displays an ability which belies the fact that he has practiced law for only six years. Gabrielle Wehl has also practiced law for six years; however, she has experience in this type of litigation.

tion actions. In fact, plaintiffs' counsel found it necessary to mollify several of their clients while handling this case.

On the other hand, there is no reason why this case should have taken priority over other cases. Similarly, there is no indication that this case caused plaintiffs' counsel to turn down other work except for the fact that it was so time consuming. The court understands that this is a one-time undertaking by the plaintiffs' counsel and that there is no ongoing professional relationship between the plaintiffs and the Richardson firm.

The court finds that an average hourly fee of $110.00 is reasonable under all of the circumstances presented and that such rate reasonably reflects the prevailing market rate for work performed by similarly situated attorneys in similar employment discrimination cases.[13]

3. *Lodestar Calculation*

The product of the attorneys' compensable time and this average market fee is one hundred thirty-two thousand and no/100 dollars ($132,000.00).[14] The court also awards thirty-four thousand nine hundred seventy-nine and 44/100 dollars ($34,979.44) in expenses, which the courts finds to have been reasonably expended under the circumstances for paralegals, law clerks, fee counsel, general office litigation expenses and expert witnesses.

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[13] Their performance is all the more impressive because defense counsel are among the most highly skilled of Alabama attorneys practicing in this field. Notwithstanding the court's lack of enthusiasm for much that has taken place, defense counsel displayed outstanding ability and a tenacious dedication to their client's cause.

[14] The court would very much prefer to calculate a lodestar figure for each attorney separately. Unfortunately, it is simply impossible to allocate the unsuccessful, unnecessary and redundant hours among the attorneys. For this reason, the court has resorted to an average figure which it finds to be reasonable when the work of all of plaintiffs counsel is considered.

III. *Summary*

Plaintiff Sheila Ann Glenn is entitled to judgment in the amount of twenty-four thousand nine hundred ninety-eight and 91/100 dollars ($24,998.91).

Plaintiff Patricia F. Johns is entitled to judgment in the amount of thirty-four thousand five hundred thirty-four and 33/100 dollars ($34,534.33).

Plaintiff Robbie Nugent is entitled to judgment in the amount of forty-three thousand seven hundred ninety-four and 57/100 dollars ($43,794.57)

Bell, Richardson, Herrington, Sparkman and Shepard, P.A. is entitled to an award of one hundred thirty two thousand dollars ($132,000.00) in fees and thirty four thousand nine hundred seventy nine and 44/100 dollars ($34,979.44) in expenses for their services in representing the plaintiffs.

An appropriate Order will be entered.

DONE this 4th day of February, 1987.

/s/ Robert S. Vance
United States Circuit Judge
Sitting by Designation

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-7171

D.C. Docket No. 83-5777

SHEILA ANN GLENN, PATRICIA F. JOHNS
and ROBBIE NUGENT,
Plaintiffs-Appellees,

versus

GENERAL MOTORS CORPORATION,
Defendant-Appellant,

SAGINAW STEERING GEAR DIVISION,
Defendant.

Appeal from the United States District Court for the
Northern District of Alabama

Before JOHNSON and CLARK, Circuit Judges, and DUMBAULD,* Senior District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

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* Honorable Edward Dumbauld, Senior U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED in part and REVERSED in part; and that this cause be and the same is hereby, REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that defendant-appellant pay to plaintiffs-appellees 75% of the costs on appeal and that plaintiffs-appellees pay to defendant-appellant 25% of the costs on appeal; said costs to be taxed by the Clerk of this Court.

Entered: April 15, 1988
For the Court: MIGUEL J. CORTEZ
Clerk

By: /s/ Warren A. Godfrey

Issued as Mandate: May 12, 1988

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-3

GENERAL MOTORS CORPORATION,
Applicant

v.

SHEILA ANN GLENN, *et al.*

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 13, 1988.

/s/ Anthony M. Kennedy
Associate Justice of the Supreme
Court of the United States

Dated this 1st day of July, 1988.

APPENDIX F

1. The Equal Pay Act, 29 U.S.C. § 206(d), provides:

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.

(4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which

exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

2. Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), provides:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Sec-

retary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

3. Section 6(a) of the Portal-to-Portal Act of 1947, 29 U.S.C. § 255(a), provides:

> Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act—
>
> (a) if the cause of action accrues on or after May 14, 1947—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.

4. Section 11 of the Portal-to-Portal Act of 1947, 29 U.S.C. § 260, provides:

> In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had

reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

APPENDIX G

The affiliates and non-wholly owned subsidiaries of Petitioner General Motors Corporation are:

Aralmex, S.A. de C.V. (Mexico);
Automotriz Gencor S.A. (Ecuador);
Autos y Maquinas del Ecuador S.A. (AYMESA) (Ecuador);
Companis Nacional de Direcciones Automotrices, S.A. de C.V. (Mexico);
Compresores Delfa, C.A. (Venezuela);
Convesco Vehicle Sales GmbH (West Germany);
Daewoo Motor Co., Ltd (Korea);
DHB-Componentes Automotives S.A. (Brazil);
Fabrica Columbians de Automotores S.A. ("Colomotores") (Columbia);
General Motors de Columbia S.A. (Columbia);
General Motors Egypt, S.A.E. (Egypt);
General Motors Iran Limited (Iran);
General Motors Kenya Limited (Kenya);
GM Allison Japan Limited (Japan);
GM Fanuc Robotics Corp. (USA);
Industries Mecaniques Meghrebires, S.A. (Tunisia);
Industrija Delova Automobils, Kikinda (Yugoslavia);
Isuzu Motors Limited (Japan);
Isuzu Motors Overseas Distribution Corp. (Japan);
Kabelwerke Reinshagen GmbH (West Germany);
Kabelwerke Reinshagen Werk Berlin GmbH (West Germany);
Kabelwerke Reinshagen Werk Neumarkt GmbH (West Germany);
Moto Diesel Mexicana, S.A. de C.V. (Mexico);
Motor Enterprises, Inc. (USA);
New United Motor Manufacturing, Inc. (USA);
Omnibus BB Transportes, S.A. (Ecuador);
Promotora de Partes Electronicos Automotrices (Mexico);

P.T. Mesin Isuzu Indonesia (Indonesia);
Senalizacion y Accessorios del Automobil Yorka, S.A. (Spain);
Suzuki Motor Co., Ltd. (Japan);
Unicables, S.A. (Spain).